91-905

(3)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6249
D.C. No. CV-85-4544-RJK

JENNY LISETTE FLORES, A MINOR, BY NEXT FRIEND MARIO HUGH GALVEZ-MALDONADO; DOMINGA HERNANDEZ-HERNANDEZ, A MINOR, BY NEXT FRIEND JOSE SAUL MIRA; ALMA YANIRA CRUZ-ALDAMA, A MINOR, BY NEXT FRIEND HERMAN PERILILO TANCHEZ, PLAINTIFFS-APPELLEES

v.

EDWIN MEESE, III; IMMIGRATION & NATURALIZATION SERVICE; HAROLD EZELL, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued En Banc and Submitted April 18, 1991
Pasadena, California
Filed August 9, 1991

OPINION

Before: Wallace, Chief Judge, Tang, Schroeder, D.W. Nelson, Canby, Norris, Wiggins, Brunetti, Thompson, Leavy, and Rymer, Circuit Judges.

Opinion by Judge Schroeder; Concurrence by Judge Tang; Concurrence by Judge Norris; Partial Concurrence and Partial Dissent by Judge Rymer; Dissent by Judge Wallace, with whom Judges Wiggins, Brunetti and Leavy join.

OPINION

SCHROEDER, Circuit Judge:

I. *INTRODUCTION*

This is a class action challenging an INS policy that requires governmental detention of children during the pendency of deportation proceedings. That policy is now codified at 8 C.F.R. § 242.24 (1988). Detention is required unless there is an adult relative or legal guardian available to assume custody, even where there is another responsible adult willing and able to care for the child and able to ensure the child's attendance at a deportation hearing. The INS acknowledges that the regulation is not necessary to ensure such attendance. It does not contend that the release of children so detained would create a threat of harm to the children or to anyone else.

The district court held that a blanket detention policy in such circumstances is unlawful. It entered an order that required, where feasible, release to a responsible party of children who would otherwise have been released if a parent or other relative had come forward. The order further required an administrative hearing for each child to determine whether, and under what conditions, the child should be released.

The INS and Attorney General appealed and a divided panel reversed the district court's holding that the detention policy was unlawful. The panel remanded for the district court to determine what procedural protections

would be appropriate under *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether there was sufficient cause to detain a juvenile pending further proceedings. A majority of active judges voted to rehear the case en banc because of the importance of the issues involved and the impact of the policy on large numbers of children arrested as illegal aliens in the Western United States. We now affirm the district court's order.

II. *BACKGROUND*

This case concerns the treatment of children who are arrested on suspicion of being illegal aliens but who have not yet been determined to be deportable. Because the children are persons present in the United States they must be afforded procedural protections in conjunction with any deprivation of liberty. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Plenary authority to determine what categories of aliens may lawfully reside in the United States and what categories must be deported resides in the Congress. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Congress has delegated the duties of the administration of the immigration laws to the Attorney General, who oversees the work of the Immigration and Naturalization Service. 8 U.S.C. § 1103(a) (granting the Attorney General authority to "establish such regulations . . . , as he deems necessary" to administer and enforce the immigration laws).

Only one relevant statutory provision addresses the release or detention of aliens between the time of their arrest and the determination of deportability or non-deportability. That statute is 8 U.S.C. § 1252(a)(1), which in all material respects has remained the same for the last four decades. It presently provides:

> Pending a determination of deportability . . . [an] alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . . [A]ny such alien . . . may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

To implement this statute, the Attorney General promulgated regulations in 1963, which are still in effect, providing that aliens arrested on the suspicion of deportability could be released until further proceedings upon a determination that such release was appropriate, and under conditions determined by the INS. 8 C.F.R. § 242.2(c)(2). Upon request, an alien is entitled to a hearing before a disinterested officer, an immigration judge, to determine eligibility for release. 8 C.F.R. § 242.2(d).

In 1984, the Western Region of the INS adopted a separate policy for minors. That policy provided that minors would be released only to a parent or lawful guardian. In his memorandum implementing this policy, former Western Region Commissioner Harold Ezell stated that the limits on release were "necessary to assure that the minor's welfare and safety is maintained and that the agency is protected against possible legal liability." The policy also provided for release to another responsible adult "in unusual and extraordinary cases, at the discretion of a District Director or Chief Patrol Agent." The Regional Commissioner did not refer to any problems that had arisen under existing regulations. He did not cite any instances of harm which had befallen children released to unrelated adults, nor did he make any reference to suits that had been filed against the INS arising out of allegedly

improper releases. It has remained undisputed throughout this proceeding that the blanket detention policy is not necessary to ensure the attendance of children at deportation hearings.

Implementation of this policy sparked concern in a number of quarters because the policy resulted in the governmental detention of a large number of children who posed no apparent risk to the community and whose presence at their respective hearings could be ensured by responsible individuals. Various individuals and groups, including many appearing as amici in this rehearing en banc, were among those who reacted adversely to the new policy. These included church groups, Amnesty International, Lawyers' Committee for Human Rights, International Human Rights Law Group and Defense for Children International.

During the course of this litigation, the INS codified the regional policy into the nationally applicable regulation now at issue. In promulgating that regulation, the INS did not refer to any particular problem that had arisen in the course of administering the immigration laws as they affected children. Rather, it simply cited the "dramatic increase in the number of juvenile aliens" found unaccompanied by a parent, guardian or a [*sic*] adult relative. 53 Fed. Reg. 17,449 (May 17, 1988). The regulation allows release to a somewhat broader class of people than did the Western Region policy, i.e., a variety of adult relatives as opposed to just parents and legal guardians, but it prohibits release in cases where other responsible adults are available to take custody of the minor. It permits release to unrelated adults only in unusual and compelling circumstances." 8 C.F.R. § 242.24.[1]

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[1] The regulation provides in full as follows:

Detention and release of juveniles.

In promulgating the regulation, the INS recognized that the principal factor bearing on release or detention is the

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(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines.

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.

In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile had identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

• • •

likelihood of appearance at future proceedings. It also recognized that the policy of preventing release to responsible adults was not related to the issue of flight risk or the administration of any provision of the immigration laws. Its principal justification for the detention rule was the theory that unless the INS were able to do a comprehensive "home study" of the proposed custodian, the child's own interests would be better served by detention. The INS stated:

> As with adults, the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings. However, with respect to juveniles a determination must also be made as to whose custody the juvenile should be released. On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released.

53 Fed. Reg. at 17,449.

In response to comments suggesting that release to responsible adults should be permitted on a regular basis, the INS stated that it did not have the resources or expertise necessary to make a determination, in each case, whether release to the adult in question would be in the child's best interests. 53 Fed. Reg. at 17,449. The INS did not state any basis for its assumption that home studies would have to be conducted. Nor did the INS indicate that it had conducted such studies before releasing children to unrelated adults prior to the promulgation of this policy. Commenters also complained that the regulation's provision that release to unrelated adults could occur in "unusual and compelling circumstances" was too vague to provide meaningful guidance. The INS responded that

such vagueness was deliberate, designed to provide "the broadest possible discretion" to INS officials. *Id.* Finally, commenters suggested that the INS should permit individuals or organizations to act as intermediaries between the INS and the parent or guardian of an alien child, to allow for release where that parent or guardian is afraid to come forward personally because of his or her own illegal alien status. After pointing out that "[t]his proposal raises some of the same concerns that release to any reliable adult raises, for example, the inability of the Service to perform "home studies," the INS concluded that it would "continue to consider the proposal," but would promulgate the regulation without such a provision at this time. *Id.* at 17,450. The final regulation was approved on May 17, 1988.

The named plaintiffs, including named plaintiff Jenny Flores, filed the action on July 11, 1985, challenging the Western Region's policy then in effect. These named plaintiffs represented a class of minors who do not pose a risk of flight or harm to the community, and have responsible third parties available to receive them, and are thus being detained only because no adult relative or legal guardian is available to take custody of them. Their complaint contained a number of claims. In the panel majority opinion, Judge Wallace described them as follows:

> The first claim alleged that the Western Region's bond release condition violated the Immigration & Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 552 *et seq.*, the fifth amendment's due process clause and equal protection guarantee, and international law. Flores's second claim challenged the INS's failure to provide (1) "prompt written notice" to the detainee that the bond release condition had been imposed,

> and (2) "prompt, mandatory, neutral and detached" review following arrest of (a) whether probable cause to arrest existed, (b) whether imposition of the bond condition was necessary to ensure future appearance, and (c) whether any available adult was suitable to ensure the detained juvenile's well-being and appearance at future proceedings. The second claim alleged that these failures violated due process and international law. Plaintiffs' last five claims, which challenged various conditions of the minors' confinement, . . . were resolved by settlement or motion. . . .

Flores v. Meese, No. 88-6249, slip op. 10747, 10764-65 (9th Cir. Sept. 7, 1990) (as amended). After the policy originally in question was codified as a regulation, this litigation was maintained as a challenge to that regulation.

Between the time that the complaint was filed and the promulgation of the national regulation implementing the Western Region policy, the district court disposed of several motions. With respect to the limitation on release to parents or legal guardians, the court ruled the provision violated equal protection. It agreed with Flores that the INS' practice of permitting alien minors in exclusion proceedings to be released to a broader class of adults than those in deportation proceedings was not supported by a rational justification. *See* 8 C.F.R. § 212.5(a)(2)(ii) (1987) (alien minors in exclusion proceedings could be released to adult relatives or to non-relatives). When the INS promulgated the regulation here at issue, it amended the regulation regarding release of children in exclusion proceedings to incorporate by reference the same restrictions as those operative in the deportation context, thus mooting the district court's ruling on this issue. *See* 8 C.F.R. § 212.5(a)(2)(ii) (1988). The court still had under advisement various motions relating to the procedural implementation of the INS' policy when the INS promulgated the official regulation.

Upon promulgation of the regulation, the district court asked for supplemental briefs and then entered an order granting summary judgment to the plaintiff class. The order invalidated the blanket detention of minors where a responsible adult could ensure attendance at the deportation hearing, and it required a hearing before a neutral and detached official in each case to determine whether release was appropriate and the conditions of release. The order provided:

> 1. Defendants . . . shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.
>
> 2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.
>
> 3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

The Attorney General and INS appealed. The majority of the panel for our court vacated the first paragraph of the district court's order, holding that the detention policy did not implicate any of the plaintiffs' fundamental rights, and that due deference to the INS' choices in implementing congressional immigration policy required approval of the INS detention policy restricting release. The majority characterized the right claimed by the class as a substantive due process right "to be released to an unrelated adult." Slip op. at 10788. Finding that the Constitution does not guarantee such a right, the majority applied a highly deferential standard of review to what it saw as an exercise of the INS' unique expertise and authority.

In considering the procedural aspects of the district court's order as embodied in paragraph three, the panel majority remanded. It rejected the appellees' contention that the fourth amendment requirement of review by a neutral and detached magistrate of probable cause for arrest, as the Supreme Court has enunciated in *Gerstein v. Pugh,* 420 U.S. 103 (1975), was applicable in the context of civil deportation proceedings. Rather, it chose as the appropriate model for procedural due process evaluation the balancing test outlined in *Mathews v. Eldridge,* 424 U.S. 319 (1976). That test would involve a balancing of the children's interest in release to a responsible adult, which the majority viewed as not constitutionally protected, against the governmental interests, which it viewed as entitled to substantial deference.

Judge Fletcher, in dissent, described the case as "among the most disturbing I have confronted in my years on the court." Slip op. at 10803. She characterized the district court's order as a "simple, sensible, minimally intrusive direction," *id.* at 10804, to protect the fundamental liberty interests of the plaintiffs who, in her view, should not be denied liberty when their "only possible offense is their alienage." *Id.* at 10803.

In their petition for rehearing en banc, plaintiffs contend, inter alia, that the panel majority erred in failing to recognize their fundamental interest in liberty. It also erred, they argue, in holding that, under either *Gerstein v. Pugh* or *Mathews v. Eldridge,* any procedure other than an individual hearing before an independent officer could provide adequate protections for the right at stake.

Before us for decision are three principal sets of issues. The first involves the detention policy itself and whether it affects any constitutionally protected liberty interests of the plaintiffs. The second involves the nature of the federal governmental interest furthered by such a policy, the justifications set forth by the agency for such a policy and the extent to which we must defer to the agency in the promulgation of such policies. The third is whether, after examination of these issues, the appropriate procedural model for the determinations at issue is the criminal model of *Gerstein v. Pugh* or the civil model of *Mathews v. Eldridge*, or indeed whether, in the context of this case, it makes any difference whether a criminal or civil model is chosen. Our discussion focuses on each of these areas in turn.

III. *DISCUSSION*

Defendants maintain that the plaintiffs' liberty interests are limited because of their status as aliens and children. We therefore examine in some detail the manner in which courts and Congress deal with the questions of rights of aliens and children.

A. *Plaintiffs' Interests as Aliens*

The Constitution protects the rights of aliens to due process and equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Even illegal aliens enjoy the due process protections of the fifth amendment. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). It is now well established that under these cases any person present in the United States is entitled to equal justice before the law, including procedural protections in conjunction with any deprivation of liberty, and freedom from invidious discrimination. *See* C. Antieau, 1 *Modern Constitutional Law* §§ 9:25-9:27 (1969 & Supp. 1991).

A crucial component of the right to personal liberty is the ability to test the legality of any direct restraint that the government seeks to place on that liberty. This ability is guaranteed through the availability of the writ of habeas corpus to challenge the lawfulness of one's imprisonment. The right to seek such a writ has its roots in English law that predates the formation of this nation. *See* Habeas Corpus Act of 1679, 31 Car. II Ch. 2. It was incorporated among the first rights guaranteed by the United States Constitution. U.S. Const. art. I, § 9. There thus can be no question that this right is a key part of the American legal system.

In any discussion of the constitutional guarantee of liberty, the importance of habeas corpus must not be understated. As one commentator has described it:

> Over the centuries habeas corpus has been the common-law world's "freedom writ" by whose process the courts may require the production of all prisoners and inquire into the legality of their incarceration, failing which they have been set free. Of the writ of habeas corpus, the United States Supreme Court has appropriately noted: "There is no higher duty than to maintain it unimpaired."

1 *Modern Constitutional Law* § 5:148 at 436 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). For this reason, to assess the nature of an alien's liberty interest, it is appropriate to look to the extent courts have historically recognized such an interest through habeas corpus proceedings.

It has long been accepted that alienage does not prevent a person from testing the legality of confinement through habeas corpus. *See Wong Wing v. United States*, 163 U.S. 228 (1896). Indeed, even a would-be immigrant who is prevented from landing in the United States and is, in that

way, deprived of liberty "is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Nishimura Ekiu v. United States,* 142 U.S. 651, 660 (1892). Thus, the status of the plaintiff class in this case as aliens whose presence in this country might be illegal does not affect their right to put the government to its proof concerning the legality of their detention.

That the detention at issue here is a civil detention imposed in the course of administering the immigration laws does not alter the relevance of the principles of habeas corpus. Still the leading case involving a test of the legality of detention under immigration laws is *Carlson v. Landon,* 342 U.S. 524 (1952). In that case, the Supreme Court dealt with a petition for habeas corpus by aliens detained prior to deportation under the Internal Security Act of 1950, because of their membership in the Communist Party of the United States. Noting that "[d]eportation is not a criminal proceeding" and thus the detention at issue was administrative, not punitive, 342 U.S. at 538, the Court nevertheless employed habeas corpus review as the appropriate means for the individual aliens to challenge their detention.

The petitioners in *Carlson* challenged their pre-deportation detention on the ground that there had been no sufficient showing that they presented an actual risk of flight or harm to the community if released pending further proceedings. Rather, they were denied release on a finding that each was an active member of the Communist party. This finding, they argued, was not sufficient to support detention. *See* 342 U.S. at 533-34.

The Court rejected this argument on the ground that the decision to detain them based on their active membership in the Communist party was made through an exercise of the discretion delegated to the Attorney General under the immigration laws. The delegated discretion was to determine which aliens pose a threat of harm to the community. The Court held that detention based on Communist party membership and activity was not an abuse of that discretion. The Court noted that the evidence went "beyond unexplained membership and show[ed] a degree . . . of participation in Communist activities." 342 U.S. at 541. Because the Court also agreed with the INS that "the doctrines and practices of Communism clearly enough teach the use of force to achieve political control," *id.* at 535-36, it found that the detention of the petitioners was proper since they posed "a menace to the public interest." *Id.* at 541.

The Court was careful to observe, however, that the discretion of the Attorney General was not without bounds. The INS policy in *Carlson* did not amount to blanket detention. The Court pointed out that there was "no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail." *Id.* at 541-42. It went on to note that the evidence before it indeed illustrated that release pending further proceedings was granted "in the large majority of cases." *Id.* at 542.

The most recent comprehensive Supreme Court discussion of an individual's interest in liberty is set in the context of adults held in pretrial detention without regard to citizenship. *United States v. Salerno,* 481 U.S. 739 (1987). The Court there recognized "the individual's strong interest in liberty," which it characterized as a "fundamental" right with which Congress could interfere only with a "careful delineation of the circumstances under which detention will be permitted. . . ." 481 U.S. at 750-51. Detention was justified only by clear and convincing evidence that the arrestee presented "an identified and articulable threat to an individual or the community. . . ." *Id.* at 751. Significantly, the Court drew a parallel between the detention at issue in *Carlson* and that challenged in *Salerno* by noting that

the *Carlson* petitioners were permissibly detained during the pendency of deportation proceedings because they were "potentially dangerous." 481 U.S. at 748. It did not in any way suggest that aliens' liberty interests were any less fundamental than those of citizens.

History may have passed *Carlson* by in some respects, particularly in its assessment of the danger attending political activity, but the case, in significant respects relevant to this case, provides guidance. *Carlson* holds that under our Constitution and an Immigration Act materially the same as the current one, the INS cannot detain individuals without a particularized exercise of discretion through which it determines that detention of an individual would prevent harm to the community or further some other important governmental interest Congress has delegated to the INS. *See also* C. Gordon and S. Mailman, 1 *Immigration Law and Procedure* § 1.03[7][d] (1988) ("the alien in deportation proceedings may be detained or required to post bond only upon a finding that he is a threat to the national security or likely to abscond.").

Thus, we must hold that aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest. That right is secured by the Constitution in its enumerated guarantee of habeas corpus to all individuals, including aliens, to test the validity of their detention through judicial scrutiny of the basis for confinement at the hands of the government. *See Salerno*, 481 U.S. 739; *Carlson*, 342 U.S. 524; *Wong Wing*, 163 U.S. 228.

B. *Plaintiffs' Interests as Children*

The plaintiffs are not only aliens; they are also minors. The INS contends that this factor materially changes the nature of their liberty interest, thereby rendering the

detention policy reasonable and appropriate. We therefore turn to the question of what effect the juvenile status of these plaintiffs may have on the analysis of their liberty interests and the protections that must be given to those interests.

The Constitution protects the rights of children to due process of law in conjunction with any deprivation of liberty. *In re Gault*, 387 U.S. 1 (1967). While a child accused of an offense may be subject to pretrial detention based on a determination that release is not safe for the child, such a determination has been held to meet the mandates of due process only where made by a neutral and detached official, with the justifications for detention clearly stated. *Schall v. Martin*, 467 U.S. 253 (1984). This holding is in keeping with the general rule that freedom from institutional confinement should be the norm, from which any deviation must be supported with specific reasons. As one set of commentators has observed, a child's "right to be treated in the manner least restrictive to the child's liberty . . . has its roots in the well-settled concept that, while constitutional rights may be restricted by the state for legitimate purposes, the restriction must be no greater than necessary to achieve these purposes." R. Horowitz and H. Davidson, *Legal Rights of Children* § 10.10 at 431 (1984). This proposition flows from the Supreme Court's general pronouncement that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnotes omitted). Under these principles, governmental confinement of a child to an institution should be a last resort.

Policies constructed to deal with the confinement of children at both the state and federal levels have recognized the practical need to avoid institutional detention where less restrictive means are available. It is the states, rather than the federal government, which are primarily responsible for child welfare issues. State courts have articulated the view that institutional confinement should be used only when another type of placement such as foster care is not possible. *See, e.g., R.P. v. State,* 718 P.2d 168 (Alaska App. 1986) (state must prove by a preponderance of the evidence that less restrictive alternatives are not possible); *In re John H.,* 48 A.D.2d 879, 369 N.Y.S.2d 196 (1975) (other options must first be fully explored). In addition to protecting any constitutional interests of the children, this avoidance of institutionalization is seen to serve their best interests. *See generally* S. Davis, *Rights of Juveniles* § 6.3 (1990) (discussing states' attempts to ensure that a child benefits in some way from whatever type of placement is ultimately chosen).

Congressional policy, where relevant, also favors avoidance of the institutionalization of juveniles. The federal government does have the occasion to process juvenile offenders when, for example, they violate federal laws or commit crimes on Indian reservations. In such situations, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.*, governs the treatment of the offenders. That Act's provisions regarding detention specify that it should occur in "a foster home or community based facility" instead of an institution, if possible. 18 U.S.C. § 5035 (regarding pre-disposition detention); 18 U.S.C. § 5039 (regarding detention after disposition). These provisions evidence an understanding that the juvenile's liberty should be curtailed only by the least restrictive means necessary to achieve the purpose at hand, and that the interests of

juveniles and of society are best served by keeping such offenders in homes rather than in institutions whenever practicable.

The foregoing analysis compels the conclusion that, just as the plaintiffs' entitlement to liberty absent a valid, particularized basis for confinement does not diminish due to their alienage, their minority does not materially change the nature of that entitlement. The INS is therefore incorrect when it asserts that plaintiffs have no fundamental liberty interest at stake. The INS is also incorrect in asserting that to prevail, the plaintiffs must be able to find in the Constitution itself, or law interpreting the Constitution, an express recognition of a "substantive due process right to be released to an unrelated adult." Such release is not the constitutional interest being secured. It is the remedy the district court imposed after ruling that the defendant's policy unconstitutionally interfered with plaintiffs' interest in freedom from unjustified governmental detention.

Whether the imposition of such a remedy was appropriate depends upon whether the detention serves a significant federal governmental purpose. It is to that issue that we now turn.

C. Government Purposes Involved

This case is unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community. Whatever purposes detention serves, they do not relate to punishment, to the need for attendance at further proceedings, or to avoidance of an identifiable risk of harm. *Contrast Salerno,* 481 U.S. 739; *Schall,* 467 U.S. 253; *Carlson,* 342 U.S. 524.

The INS articulates two reasons for the detention. First, the INS suggests that the child's interests would be better served by detention than by release to a responsible adult whose living environment the INS does not have the means to investigate. Second, it asserts that the policy is necessary to protect it from potential liability in the event some harm should befall the child after release.

The INS does not articulate any legal basis for its position that these are valid INS concerns. The first flies in the face of the Supreme Court's ruling in *Gault* that children should be treated in a manner least restrictive of liberty. It also expresses a view contrary to the Supreme Court's decision in *Schall,* which required a foreseeable risk of harm to justify detention. While the Supreme Court in *Schall* recognized that a child, because of a lack of maturity, should have some adult custody and care, 467 U.S. at 265, it did not remotely suggest that there may be a presumption in favor of governmental detention as serving the best interests of the child.

The INS in essence maintains, however, that we should not look behind their articulation of concerns because we must defer to any such articulation. Agencies are, of course, entitled to some deference when they make determinations that relate to an area of their special expertise. *See United States v. Shimer,* 367 U.S. 374, 383 (1961). In the immigration field, then, courts owe deference to decisions of the INS where its special experience and authority in the area of alienage are called into play. *See Carlson,* 342 U.S. at 540-41.

The justifications asserted here, however, relate to child welfare and the potential liability of child welfare agencies. Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference. *See Hampton v. Mow Sun Wong,* 426 U.S. 88, 114-15 (1976) (court does not defer to agency determination in area outside of agency's expertise). Nor does this policy carry out any express congressional directive. Rather, the policy is contrary to Congress' determination that institutional detention of juveniles is disfavored. *See* 18 U.S.C. §§ 5035; 5039. One of the very reasons the INS gives for detaining the plaintiffs is that it does not have the expertise, and Congress has not given it the resources, to do the kind of evaluation of foster care facilities that state child welfare agencies do on a routine basis. The INS reasons that since it is unable to do such an evaluation, the best interests of the child must lie in detention rather than in release. The Constitution requires the opposite conclusion. *See Gault,* 387 U.S. 1. We therefore hold that the INS may not determine that detention serves the best interests of members of the plaintiff class in the absence of affirmative evidence that release would place the particular child in danger of some harm.

Our conclusion that the INS cannot maintain a blanket policy of detention thus does not absolve the INS from the responsibility of making individualized decisions concerning the fate of children it has arrested. Due process requires a particularized exercise of discretion in conjunction with the decision to grant or deny release to any alien. *See Carlson,* 342 U.S. at 542. It is, of course, within the purview of the INS to determine whether or not the person available to assume custody will ensure the child's attendance at future proceedings. It is also within the purview of the INS to determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child. The blanket refusal to make individualized determinations in the guise of administrative expediency, however, cannot pass constitutional muster. *See, e.g., Reed v. Reed,* 404 U.S. 71, 76-77 (1971) (administrative convenience does not justify a policy that otherwise runs afoul of the Constitution).

The INS' secondary justification for its detention policy is that if it released a child to an unrelated adult based on a determination short of a detailed "home study," it could be subject to liability in the event that some harm befell the child. The INS does not specify the source of such liability.

We find little indication that the INS would be subject to liability for releasing a minor to an unrelated adult without a "home study." Such a "study" is concededly beyond the expertise of the Service. The Supreme Court's holding in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), would give an individual a cause of action against the INS for a violation of constitutional rights, an action analogous to the cause of action available through 42 U.S.C. § 1983 against those who violate federal rights under color of state law. The Supreme Court has recently held, however, that a state agency, with far more expertise in child welfare than the INS, could not be held liable under section 1983 for allowing a child to remain in the custody of an adult despite clear evidence that such custody placed the child in danger. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Court concluded that the actions of a private citizen could not form a basis for liability of the Department under section 1983. It did not matter, the Court held, that the child had formerly been in state custody, because "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.* at 201.[2]

[2] A state would of course face a somewhat greater threat of liability after releasing a child to the custody of a responsible third party as opposed to the custody of a parent as in *DeShaney*. This is because the state would have acted affirmatively to place the child in a home from which the child had not originally come, as opposed to returning the child to the same home and assuring placement in "no worse position than that in which he would have been had [the state] not acted at all." *Id.* at 201.

Decisions before and since *DeShaney*, as well as *DeShaney* itself, compel the conclusion that governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody. *See DeShaney*, 489 U.S. at 200-201 (emphasizing that absence of duty on the part of the state to ensure child's safety arose from the fact that the plaintiff was not in the state's custody at the time of the injury); *Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982) (when individual is in state custody, state may acquire constitutional duty to ensure individual's safe care); *Lashawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991) (under *DeShaney* and *Youngberg*, state agency may be liable for constitutional tort where it fails to provide adequately for the safety and well being of children in its custody). We reject the INS' claim that it must detain these children to avoid lawsuits. In so doing, we follow the lead of the Supreme Court, which has recently refused to uphold an argument that possible tort liability justified a policy that violated the rights of individuals, where such liability was "remote at best." *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208 (1991).

We therefore conclude that the first paragraph of the district court's order is an appropriate means to prevent incarceration of juveniles where such incarceration serves no legitimate purpose of the INS. It provides that release to a responsible adult shall occur only if the child would have otherwise been eligible for release to a relative under the challenged policy. It takes into account the need to secure attendance at immigration proceedings, and does not fore-

close the ability of the INS to order detention if there are other, valid reasons for detention. In addition, by specifying that where there is no relative or legal guardian available release may be made to a "responsible" party, it allows room for the INS to make the necessary determination of whether a party who is willing to assume custody of the child is fit to do so.

D. *Procedural Due Process and Part Three of the District Court's Order*

From the beginning of this litigation the parties have disputed whether the determination of what process is due in conjunction with the decision to detain members of the plaintiff class should be made pursuant to *Gerstein,* 420 U.S. 103, or *Mathews,* 424 U.S. 319. In *Gerstein,* the Court determined that a "timely judicial determination" was a mandatory prerequisite to pretrial detention in the criminal context. 420 U.S. at 126. In *Mathews,* the Court articulated a three-factor analysis designed to be applicable generally to questions of due process in conjunction with administrative actions. A reviewing court must consider first the private interest that the action affects, second the risk that the procedures currently utilized will result in an erroneous deprivation of that interest and the extent to which that risk could be lessened by the addition of more safeguards, and third the government's interest in maintaining the current procedures. 424 U.S. at 335. The plaintiffs have urged that *Gerstein* be followed, while the INS has argued that *Mathews* provides the proper mode of analysis.

Because we have held that the plaintiffs' interest in freedom from detention requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity, we must affirm Part Three of

the district court's order regardless of whether we apply *Mathews* or *Gerstein.* In so doing, we note that under current regulations, the INS is already required to maintain the mechanisms for providing review by an Immigration Judge of any decision to detain an alien or of conditions imposed on the release of such alien, if the alien requests such a hearing. *See* 8 C.F.R. § 242.2(d). The only new requirements that Part Three of the district court's order places on the INS are that, if the alien is a child, such a hearing must be held regardless of whether the alien requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being. The first of these additional requirements is reasonable because the members of the plaintiff class, as children, are less capable than others of understanding what they are waiving by failing to request a hearing. The second is reasonable in light of the private interest at stake. We therefore conclude that Part Three of the district court's order provides the appropriate procedural safeguards for the deprivation here at issue, and accordingly uphold it.

IV. *CONCLUSION*

The district court correctly held that the blanket detention policy is unlawful. The district court's order appropriately requires children to be released to a responsible adult where no relative or legal guardian is available, and mandates a hearing before an immigration judge for the determination of the terms and conditions of release.

The majority panel opinion is VACATED and the order of Judge Kelleher is AFFIRMED in all respects.

TANG, Circuit Judge, concurring:

I concur wholeheartedly in the majority's judgment and I concur in the majority opinion insofar as it goes. I write separately to emphasize my belief that the liberty interest at issue—freedom from governmental detention and restraint—is a fundamental right expressly protected by the fifth amendment to the Constitution. Indeed, freedom from governmental restraint is the core, the very crux of any governmental system dedicated to preserving the integrity and inviolability of the individual. I write separately also to highlight the two distinct deprivations of liberty occasioned by the INS's policy.

A. *The Right at Issue*

The original panel opinion in this case and the current dissent denominate the right at issue as the "right to be released to unrelated adults." This characterization of the children's liberty interest stands the Constitution on its head. It presumes the government's right to detain and requires children, who have committed no offense greater than being *suspected* of being deportable, to prove their entitlement to release. Even assuming that non-textual rights need to be carefully articulated, there is no reason to afford "liberty"—language right out of the Constitution's text—such a cramped interpretation.

I agree with the majority's conclusion that one textual source of the right to freedom from governmental restraint is the Constitution's habeas corpus guarantee. U.S. Const. art. I, § 9. The majority's analysis of the constitutional basis for the right at issue is not complete, however.

Physical freedom from governmental detention and restraint—liberty in its most elemental form—is a fundamental constitutional right guaranteed by the due process

clause of the fifth amendment. This freedom from governmental restraint is both a substantive right and an entitlement to certain procedural protections when the government acts to deprive a person of physical liberty.

A recent acknowledgement of the substantive due process right to freedom from governmental restraint can be found in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). In *DeShaney,* the Supreme Court expressly stated:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

Id. at 200.

The *DeShaney* court's observation was not novel. Numerous precedents already recognized the individual's fundamental right to freedom from restraint. *See, e.g., United States v. Salerno,* 481 U.S. 739, 749 (1987) ("Respondents [invoke] . . . the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a 'general rule' may freely be conceded. . . ."); *Youngberg v. Romeo,* 457 U.S. 307, 309, 316, 319 (1982) (Court recognizes "substantive right[ ] under the Due Process Clause" to "freedom from bodily restraint" and observes that "[i]n other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of liberty protected by the Due Process Clause from arbitrary governmental action,' " (quoting *Greenholtz v. Inmates, Nebraska Penal & Correctional Complex,* 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dis-

senting in part))); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.").[1]

These cases recognize explicitly what our constitutional jurisprudence historically has acknowledged implicitly through presumptions and assumptions about the relationship between government and the governed in this country. Liberty is the norm; arrest, detention, or retraint by the state is the exception. To operate otherwise makes a mockery of "government of the people, by the people." Some of our most cherished rights—freedom of speech and of religion, the right to vote, travel, and to be free from unreasonable searches and seizures—would mean nothing if we had to live under the heavy hand of government.

The strict burdens that the Constitution imposes on government's efforts to deprive individuals of their liberty reveal that freedom from governmental restraint is a fundamental right and the cornerstone of democratic government. Government may not incarcerate a person unless it proves that person's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Government may not arrest and detain persons absent probable cause to believe a crime has been committed by them. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). The brief delay in physical freedom occasioned by a stop-and-frisk cannot be imposed absent a reasonable and particularized suspicion of danger. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The

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[1] Indeed, the Supreme Court's recent opinion in *Cruzan v. Director, Missouri Dep't of Health* implicitly acknowledges this substantive right when it affirms the individual's right, under the due process clause of the fourteenth amendment, to refuse unwanted medical treatment. ___ U.S. ___, 110 S. Ct. 2841, 2851 (1990).

operative assumption in our society is that government may not intrude into the private sanctuary of the individual. Exceptions will be made if, and only if, the state makes a very strong showing of necessity.

To reduce liberty, as the original panel and the dissent suggest, to nothing more than an entitlement to certain procedural protections and thereby to burden the children with showing a "right to release" ignores the very substance of the Bill of Rights. The Bill of Rights, including the fifth amendment, is our country's blueprint for individual freedom. It maps out limits beyond which the government may not step. Our conception of liberty should thus be drawn in terms of what government may not do (restrain) rather than in terms of what children must do (show entitlement to release).

To see the right in strictly procedural terms fails to recognize that the genesis of these procedures and presumptions is our Constitution's fundamental belief in the sovereignty of the individual. It is this principle that defines the substantive right to liberty, to freedom from government restraint. The rules and presumptions mandated by procedural due process are not themselves "liberty." Rather, they are the indispensable guarantees and requirements of the substantive right to freedom from governmental restraint. Liberty under the due process clause is thus both a process and a condition, and it is a right with which the children who brought this action are endowed.[2]

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[2] The dissent and the original panel attach significant weight to Justice Scalia's statement in *Cruzan*, ___ U.S. at ___, 110 S. Ct. at 2859 (Scalia, J., concurring), that the due process clause "does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.'" Yet no other member of the Supreme Court joined Justice Scalia's straitened reading of the fifth amendment.

B. ***Procedural Due Process***

Defining the right at issue only begins our constitutional inquiry. That a right is fundamental does not mean that it is inviolable. *See, e.g., Youngberg*, 457 U.S. at 319-20 (liberty interest protected by substantive due process is not absolute). Just as government may on occasion limit speech or religious practices, so may government restrict or deny physical liberty to some extent, upon making the constitutionally-mandated showing of necessity. We thus must determine whether the limitations imposed by the INS on the children's liberty comport with the substantive and procedural components of the fifth amendment's due process clause.

Much of the unease occasioned by the INS's policy and the original panel's opinion derives from the fact that the INS imposes conditions on a child's release before there is even a neutral and independent review of its authority to detain a child (and, concomitantly, to limit her release). This puts the cart before the horse. We cannot fairly discuss the INS's ability to condition the children's release or its interest in ensuring the children's return and safety until the INS has established its authority to detain the children in the first instance. Unlike the majority, I turn therefore to the procedural due process issue before addressing the constitutionality of the release conditions.

Much of the parties' debate focuses on whether *Gerstein v. Pugh*, 420 U.S. 103, or *Mathews v. Eldridge*, 424 U.S. 319 (1976), prescribes the appropriate framework for the procedural due process analysis. I agree with Judge Rymer's conclusion that *Mathews* governs. Deportation is a civil, not a criminal, proceeding. *See Carlson v. Landon*, 342 U.S. 524, 537-38 (1952). The Supreme Court has repeatedly invoked *Mathews* to test the constitutionality of civil deprivations of liberty. *See, e.g., Landon v.*

Plasencia, 459 U.S. 21, 34 (1982) (INS exclusion proceedings); *Parham*, 442 U.S. at 599-600 (commitment of children to mental health facility); *Greenholtz*, 442 U.S. at 14 (parole hearings); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (involuntary commitment of children to mental hospital); *Ingraham v. Wright*, 430 U.S. 651, 675 (1977) (corporal punishment of students); *see also Salerno*, 481 U.S. at 746 (regulatory pretrial detention under Bail Reform Act); *accord Youngberg*, 457 U.S. at 320-21 (involuntarily committed patients). While the children correctly point out that the Court frequently cites *Gerstein* in these cases, the opinions speak, and the analysis is conducted, in the language of *Mathews*. Because the Supreme Court has used *Mathews* to test the propriety of a variety of civil incarcerations, including an INS proceeding, we must apply *Mathews* in this instance.

In applying *Mathews*, we must balance (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail. *Mathews*, 424 U.S. at 335.

The private interest at issue is, of course, the children's liberty from governmental detention and restraint. This interest is substantial and compelling. "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425; *see also Salerno*, 481 U.S. at 750 (noting the "importance and fundamental nature of this right [to liberty]"); *Schall v. Martin*, 467 U.S. 253, 265 (1984).

Moreover, the adverse consequences of detention are legion, consequences exacerbated by the youth of the detainees. Detention by the government stigmatizes children, regardless of the ultimate resolution of their respective cases. Children in INS detention centers enjoy, at best, very limited educational and recreational opportunities. They are away from family and friends; every aspect of their daily life is regulated by strangers. *See Plasencia*, 459 U.S. at 34 (right to regain family "ranks high among the interests of the individual"). They have very little privacy, may be shackled and handcuffed, and lead a very regimented life.

Furthermore, the risk of an erroneous deprivation of liberty by the INS is substantial. As Judge Fletcher pointed out in her dissent from the original panel's decision in this case, many persons arrested by the INS will ultimately prove not to be deportable. Some of these children will be found to be citizens, legal aliens, or entitled to political asylum.

Currently, an officer's determination of deportability is subject only to review by a second immigration officer, who determines whether prima facie evidence of a violation of the immigration laws exists. 8 C.F.R. § 287.3. If no second officer is available, the prima facie determination may be made by the original arresting officer. *Id.* At no point does an official detached from the enforcement function test the sufficiency of the evidence to arrest and detain. *See id.*[3]

[3] This regulation covers arrest of persons without a warrant. The issuance of a warrant is covered by 8 C.F.R. § 242.2(c). These arrest warrants are issued by INS officer, not neutral third parties. Thus even the presence of an arrest warrant does not indicate that the decision to detain has been reviewed by an official independent of the law enforcement function.

The majority correctly notes that a child may have the propriety of her detention or of conditions on her release reviewed by an immigration judge if she specifically requests such as hearing. 8 C.F.R. § 242.2(d). INS officers, however, are not required to inform arrested children of this right. *See* 8 C.F.R. § 242.2(c)(2). This provision thus does nothing to cure the constitutional defect in the INS's procedures. Freedom from governmental restraint is not a right reserved exclusively for those schooled in the intricacies of INS regulations. "No matter how elaborate and accurate the . . . proceedings available under the [regulation] may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place." *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (footnote omitted).

Our Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decision making. *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("an impartial decision maker is [an] essential" component of due process); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) ("A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process."); *see also Parham*, 442 U.S. at 606 (civil commitment of mentally ill children must be reviewed by neutral fact finders); *Gerstein*, 420 U.S. at 114.

These cases recognize the importance of neutral and detached review as a protection against the overzealous prosecutor or law enforcement official.

> A democratic society, in which respect for the dignity of all [persons] is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of

> soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

McNabb v. United States, 318 U.S. 332, 343 (1943); *see also Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (probable cause for issuance of an arrest warrant must be determined by an official independent of the police and prosecution); *Coolidge v. New Hamphire*, 403 U.S. 443, 450 (1971) (prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate).

The INS's procedure does nothing to protect against the risk of error and unfairness. The field officer's determination is, at best, reviewed by another law enforcement officer. At worst, the arresting officer reviews his own decision. The INS cites no case, nor have any been found, where the Supreme Court has tolerated a deprivation of physical liberty unaccompanied by any provision for independent and neutral review of the decision to incarcerate. To the contrary, statutory schemes for detention (civil or criminal) previously reviewed by the courts have involved some measure of independent review of the initial decision to detain. *See, e.g., Salerno*, 481 U.S. at 750 (pretrial detention predicated upon governmental showing by clear and convincing evidence to a neutral decisionmaker of need to detain); *Schall*, 467 U.S. at 269-70 (juvenile detention reviewed for probable cause by member of judicial branch); *Parham*, 442 U.S. at 606-07 (commitment of children must be reviewed by a neutral and detached trier of fact); *see also In Re Gault*, 387 U.S. 1, 30 (1967) (child committed to juvenile detention entitled to hearing containing "the essentials of due process and

fair treatment"). Our Circuit's precedent similarly insist upon the neutral review of decisions to retrain individuals for any significant period of time. *Gary H. v. Hegstrom*, 831 F.2d 1430, 1433 (9th Cir. 1987) (due process hearings for adolescents detained for criminal behavior); *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (involuntary commitment decisions must be reviewed by independent decisionmaker to reduce error, since consequences of liberty deprivation are so severe).

With respect to the third *Mathews* factor, the INS asserts in vague and conclusory terms that it will be burdened by a mandate to provide prompt impartial review of its officers' findings of probable cause to arrest and detain children. The INS provides no specifics, however. Both the record and common sense, on the other hand, reveal that the requirement need not be unduly burdensome. A quasi-judicial scheme of administrative judges (immigration judges) already exists within the INS that could provide the necessary detached review. The institution of such a practice, moreover, will relieve INS law enforcement officers of the duty to review their fellow officers' arrests to determine whether a prima facie case for deportability exists.

Given the substantial liberty interest involved, the proven record and constant risk of error, and the failure of the INS to articulate anything more than vague and unsubstantiated objections to neutral review, I conclude that the due process clause requires the INS promptly to afford detained children an impartial and detached review of their detention. At such a hearing, the burden must be on the INS to demonstrate the propriety of detention. *Gallinot*, 657 F.2d at 1023 ("It is the state, after all, which must ultimately justify depriving a person of a protected liberty interest . . . .").

C. *Conditions on Release*

Once the INS has demonstrated before a neutral and detached decisionmaker a prima facie case of deportability, the INS's legitimate interests in ensuring that child's return for future hearings and, to some extent, that child's safety entitle it to impose conditions on the child's release. Those conditions, however, may not restrict the child's liberty any more than is necessary to achieve the INS's stated goals of ensuring return and safety.

I wholeheartedly agree with the majority's holding that the regulation's prohibition on release to responsible third parties cannot survive scrutinty under the due process clause. Where, as here, the children detained have not individually been shown to be a flight risk, a threat to the community or to themselves, or guilty of any crime, governmental restrictions on liberty must be narrowly tailored to promote the government's articulated interests.

As the majority aptly demonstrates, the INS has not shown that precluding release to child welfare agencies, church groups, immigration rights' groups, and other responsible third parties increases the risks of flight or injury to the child. Unsubstantiated speculation that flies in the face of the historic record of successful releases to third parties cannot outweigh the children's compelling liberty interest. On the other hand, the tragic consequences of prolonged detention are readily discernible. Nor are the INS's liability concerns sufficient to justify confined detention. As the majority notes, the legal liability accompanying prolonged detention greatly exceeds the INS's unproven and overblown apprehensions about legal exposure after release to a responsible third party.

CONCLUSION

While the majority and I differ to some extent in our analyses of the constitutional issues presented, our points of agreement are much more numerous. I believe that the children's fundamental right to freedom from government detention has its roots, not only in the Constitution's guarantee of habeas corpus, but also in the fifth amendment's protection against deprivations of liberty without due process. I also agree with the majority's reasoning and conclusions concerning the conditions on release and procedural due process. I write separately on these issues only to emphasize that we are dealing with the constitutionality of two distinct deprivations of liberty—the initial decision to detain and secondly the conditions imposed upon release after detention. Only when the initial and most drastic deprivation of liberty has been accomplished in a manner that comports with the Constitution can we then address the legality of the INS's release conditions.

NORRIS, Circuit Judge, concurring:

I join Judge Schroeder's opinion for the *en banc* court, but write separately to say that the INS' policy of incarcerating children pending deportation hearings rather than releasing them to the temporary custody of responsible non-relative adults, not only violates due process, but does so flagrantly.

This case does not involve the fashioning of some "new" substantive due process right to "be released to unrelated adults," *see* dissenting op. at 10832 (Wallace, C.J.). It has nothing to do with the controversy over constitutional protection of privacy interests. The dissent's concern about limiting the reach of "substantive due process" and its reliance on such cases as *Bowers v. Hardwick*,

478 U.S. 186 (1986),[1] unnecessarily cloud the issue. If the word "liberty" as used in the Due Process Clause means anything, it means "liberty from bodily restraint . . . [which] is at the heart of the liberty protected by the Due Process Clause." *Board of Pardons v. Allen*, 482 U.S. 369, 373 n.3 (1987). The Supreme Court has repeatedly said that liberty includes freedom from bodily restraint as an absolute minimum. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1953) ("'[L]iberty' . . . is not confined to mere freedom from bodily restraint."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922) ("[L]iberty . . . denotes not merely freedom from bodily restraint . . . ."). Because the prehearing detention of children so clearly deprives them of their liberty, the Due Process Clause requires the INS to justify its policy by "sufficiently compelling governmental interests." *United States v. Salerno*, 481 U.S. 739, 748, 750 (1986).

The governmental interests asserted by the INS to justify its policy are trivial. The INS admits that its policy does not even serve the government's legitimate interest in assuring the children's appearance at deportation hearings. What the INS' justification for its policy boils down to is money. It claims that it does not have the "competence" or "resources" to "conduct meaningful screening . . . of the environment in which the children will live." *Appellants' Response to Order Dated August 20, 1990* at 6-7. It characterizes home studies as a "delicate undertaking" that is "ordinarily carried out by skilled social workers." *Id.* Translated, this means that our government chooses to hold children in detention facilities, despite the INS' lack of competence to care for them, rather than pay

[1] *Bowers* held that the Due Process Clause of the Fourteenth Amendment does not prohibit states from criminalizing homosexual sodomy.

for the services of qualified social workers to conduct home studies of the kind that county social service agencies perform routinely. The INS makes no effort to price such services, nor does it make any effort to show that the cost of such services would be greater than the cost of holding the children in the INS' own detention facilities. It merely throws up its bureaucratic hands and shrugs that it has no money to pay for home studies.

The INS' justification for its policy pales in comparison with the governmental interests that have been held to justify prehearing detention. These children are not dangerous, as in *Salerno*, 481 U.S. at 741 (approving detention of the head and "captain" of the Genovese crime family when "no release conditions 'will reasonably assure . . . the safety of any other person and the community.' ") and *Schall v. Martin*, 467 U.S. 253, 264 (1986) (upholding detention of juvenile accused of hitting a youth over the head with a loaded gun under law "designed to protect the child and society from the potential consequences of his criminal acts"). Neither are they a menace to the public interest, as in *Carlson v. Landon*, 342 U.S. 524, 541 (1952) (upholding detention of alien Communist Party members to prevent "menace to public interest"), or a threat to the national security, as in *Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving detention during World War II of enemy aliens found to be dangerous).

In an effort to salvage the INS policy, the dissent goes so far as to assert that the Due Process Clause provides less protection for the liberty of children than for the liberty of adults. Liberty interests are not "weighed differently for minors in comparison with adults." *See* dissenting op. (Wallace, C.J.) at 10833 (citing *Schall*). *Schall* stands for the quite different proposition that a juvenile's liberty interest can "in *appropriate circumstances* be subordinated to the State's *parens patriae* interest in preserving and pro-

moting the welfare of the child." *Schall*, 467 U.S. at 265 (emphasis supplied). Here the INS has no *parens patriae* interest to weigh against the juvenile's liberty interest. The dissent casts the INS as a parent, but I see only a jailer.

Finally, the mere incantation of Congress' plenary power over immigration policy should not be the siren song that leads us astray from applying settled due process principles to the facts of this case. Congress' broad power to fashion immigration policy no more authorizes the INS to hold people without due process than a state's sovereign power to pass criminal laws authorizes the imprisonment of people without due process. By invoking Congress' power to set standards of deportability as an excuse for the detention of children pending hearings on their deportability under those standards, the dissent blurs the distinction between the enactment of immigration laws and the enforcement of those laws. I know of no authority for the dissent's boundless description of the "judiciary's limited judicial role" in reviewing all "immigration decisions" or any action it can relegate to "the immigration context." *See* dissenting op. (Wallace, C.J.) at 10834-35. In applying due process principles, we balance "interests," not "contexts."

The very cases that the dissent cites for limiting judicial review of all "immigration decisions" recognize the crucial distinction that the dissent ignores. "In the enforcement of . . . [immigration policies], the Executive Branch of the Government must respect the procedural safeguards of due process . . . . [even if] the formulation of these policies is entrusted exclusively to Congress." *Fiallo v. Bell*, 430 U.S. 787, 792 n.4, at 793 (1977), *quoting Galvan v. Press*, 347 U.S. 522 (1954). Thus the cases cited by the dissent are inapposite in a case involving the detention of children during the process of enforcing the immigration laws. For example, *Adams v. Howerton*, 673 F.2d 1036

(9th Cir.), *cert. denied*, 458 U.S. 1111 (1982), involved judicial deference to a congressional decision to deny immigration preferences to partners in same sex relationships. *Galvan v. Press*, 347 U.S. 522, 531 (1954), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952), upheld statutes making Communist Party members deportable. Finally, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), upheld a statute denying immigration preferences to persons whose mothers are aliens, but whose fathers are citizens or lawful permanent residents. None of these cases involved the procedures followed by the INS in enforcing the immigration laws passed by Congress.

In sum, the deprivation of the children's liberty is so plain, and the government's interest in detaining them so trivial, that the due process violation could not be more clear-cut.

RYMER, Circuit Judge, concurring in the judgment in part and dissenting in part:

I agree with the majority that this case is particularly troubling. The thought of prolonged detention of children who have done nothing more than to be in this country illegally, and to be without a parent or relative willing to come to their rescue, touches a raw nerve in us all. Even so would we be sickened were one of these children to be precipitously released to abuse, neglect or worse.[1] A con-

[1] Obviously amici present no such risk. Neither the district court's order nor the majority's opinion, however, would limit release to organizations of their caliber. "Responsible adult party" is left undefined; a financially responsible adult may not be morally responsible, and vice versa. Nor does the order restrict release to a *legally* responsible adult, by contrast with 8 C.F.R. § 242.24(b)(4), which requires an unrelated adult to whom a juvenile may be released to execute an agreement to care for the juvenile's well-being. *See also*

stitutionally appropriate balance must therefore be struck between the alien minors' interest in freedom from institutional restraint and the government's responsibility for their safety.

I write separately even though I agree with much of the majority's bottom line, because I believe the case can be decided more narrowly and in a way that will safeguard valuable rights more effectively than the district court's order. I part company with both the district court and the majority to the extent they hold that the Constitution substantively requires release to any responsible adult who will promise to bring the minor to future hearings, and I disagree that a probable cause hearing is constitutionally required for juveniles held in deportation proceedings. Instead, I conclude that current INS procedures are constitutionally insufficient to afford an alien juvenile the process she is due when it has been determined that she may be released from INS custody, but that she has no parent, guardian, adult relative, or person designated by a parent or guardian to assume custody. Without assurance of an early determination by a neutral hearing officer of whether to release the juvenile under these circumstances, and absent an outside limit on the length of time the juvenile may continue to be held even though it has been determined that she is eligible for release, the risk that the child will be unduly detained outweighs the government's remaining interests in maintaining custody and assuring well-being.

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§ 242.24(b)(3) (imposing a similar requirement on a person designated by the parent or legal guardian to take custody of a detained juvenile in their absence). So the district court's order also leaves open the possibility of release to an adult who appears to be morally and financially responsible, but whose legal responsibility for care and presence lacks teeth and is unenforceable.

The Due Process Clause of the Fifth Amendment assures that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Supreme Court has held that

> the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v. California, 342 US 165, 172, 96 L Ed 183, 72 S Ct 205, 25 ALR 1396 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v Connecticut, 302 US 319, 325-326, 82 L Ed 288, 58 S Ct 149 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v Eldridge, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976). This requirement has traditionally been referred to as 'procedural' due process.

United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

The district court's judgment does not indicate which component was violated. To the extent its order requires a substantive change in the regulation – directing release to a "custodian, conservator, or other responsible adult party" who promises to bring the minor to future hearings, I infer that the court believed § 242.24(b)(4) runs afoul of due process on substantive grounds; I assume it also found the regulation wanting on procedural due process grounds since it ordered an administrative hearing to determine probable cause for the minor's arrest and need for restrictions on her release.

While Flores does contend that the minors' interest in personal liberty is a fundamental constitutional right that

substantively overrides the INS restriction on release of children, in her brief to this court and at oral argument she concedes that the district court's order may be seen as wholly procedural and could be affirmed on procedural grounds. Because I agree that the INS's regulation falters for lack of minimum procedures comporting with due process, I see no need to reach more broadly at this time.[2]

The fifth amendment protects physical freedom by requiring that the government satisfy rigorous procedural safeguards before taking it away. Procedural fairness has traditionally been tested under *Mathews v. Eldridge*, 424

[2] Section 242.24(b)(4) appears to assume that the INS has made no determination that detention is required to ensure timely appearance or safety. While release to an unrelated adult is not mandatory, as it is to a parent, guardian or adult relative under § 242.24(b)(1), the regulation itself creates a liberty interest in freedom from continued restraint. The dispositive question for us, therefore, is whether the procedures by which the INS decides if it should release a juvenile to the custody of an unrelated adult survive facial challenge.

Assuming that alien juveniles have a protected liberty interest in freedom from institutional restraint such that their failure to be released to a "responsible adult" who promises future appearances triggers substantive due process scrutiny, *see Salerno*, 481 U.S. at 750, their interest "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody," *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). Thus, their real interest is not in freedom from restraint (detention), but in freedom from a particular kind of limitation on the conditions under which release will be permitted. Because the children are minors, the government's parens patriae responsibilities are implicated and the juveniles' interest in freedom from restraint is therefore less substantial than an adult's and their interest in being released to any "responsible adult" is less substantial than their interest in being released to a parent, guardian or family member with whom they enjoy a natural or legal bond. By the same token, the government's interests in exercising its nearly plenary power over immigration, and discharging its obligation to protect and promote the welfare of juveniles within its custody, are substantial.

U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The Court restated the framework for analysis in *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982), an immigration case, as follows:

> The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances. In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Id. at 34 (citations omitted).

The alien juveniles' interest has considerable weight: they stand to continue losing freedom from INS restraint even though the INS will not have determined that they need to be detained for reasons of flight or safety.[3] On the other hand, the government's interests in the well-being of minors in its custody and in assuring that these children not be entrusted to the care of an unqualified person are likewise strong. In addition,

> [t]he Government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the

[3] Flores also complains of the Catch-22 the regulation creates on account of the fact that parents or adult relatives of alien juveniles may be deterred from coming forward to the INS because they, too, may be here illegally. While there is nothing much for it, the conundrum does to some extent affect the juveniles' opportunity to rejoin their family. *See Landon*, 459 U.S. at 34 (right to rejoin immediate family ranks high among the interests of the individual).

> executive and the legislature. The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.

Id. at 34-35 (citations omitted).

Flores challenges the regulation on four scores: (1) lack of a probable cause hearing on deportability; (2) lack of a prompt custody hearing; (3) failure to impose a burden of proof on the government; and (4) absence of independent review. She urges that the district court's order imposing limited procedural safeguards, be affirmed. While the INS agrees that the record permits Flores's procedural due process claim to be resolved by this court without remand for further proceedings, it argues that the claim lacks merit because there is minimal risk of erroneous deprivation of the minors' interest. It relies on 8 U.S.C. § 1357(a)(2), which provides that an alien must be taken for examination before an officer other than the one who arrested her "without unnecessary delay," and on a regulation that requires the examining officer to be satisfied that there is prima facie evidence to believe the alien is deportable. 8 C.F.R. § 287.3 (1990). It therefore argues that even if *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), applies in a civil proceeding, the district court erred in mandating a probable cause hearing because the INS's standard is higher and is subject to review by an examining officer as well as the arresting officer. For these reasons it contends that requisite standards of fairness are met.

Turning first to whether a probable cause hearing is required, I agree with the INS that importing *Gerstein* to a civil immigration proceeding is problematic, *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L.

Ed. 2d 778 (1984) (consistent with civil nature of deportation proceeding, protections such as exclusionary rule that apply in context of criminal trial are not applicable). No authority suggests that a probable cause hearing before a neutral magistrate, as distinguished from a prima facie evidence hearing before an examining officer, is constitutionally mandated in deportation proceedings. Our cases suggest the contrary, *see, e.g., Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975) (declining to require Miranda warnings in deportation proceeding); *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (sixth amendment safeguards not applicable in deportation proceeding), *cert. denied*, 400 U.S. 854, 91 S. Ct. 72, 27 L. Ed. 2d 92 (1970), and there is no call to hold otherwise.

The INS's argument, however, fails to come to grips with the absence of other, well-recognized ingredients of procedural fairness. Unlike the statutes at issue in *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984), and *Salerno*, which survived due process challenges,[4] the INS regulations provide no opportunity

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[4] In *Salerno*, 481 U.S. at 751-52, the extensive safeguards under Bail Reform Act included: judicial evaluation of likelihood of dangerousness; detainees had right to counsel and could testify and present information; the judicial officer's discretion was statutorily guided; the government has the burden of proof by clear and convincing evidence; and the judicial officer had to make findings of fact and give reasons for a decision to detain, which was immediately reviewable on appeal. In *Schall*, 467 U.S. at 257 n.3, 270, preventive detention of juveniles suspected of a criminal offense promoted legitimate interests of society and the juvenile and did not amount to punishment such that it offended substantive due process when: the detention was limited in time; a neutral magistrate determined that detention was necessary; the time limits seemed suited to the limited purpose of providing the young person with a controlled environment and separating the juvenile from improper influences pending a speedy disposition of the case; and the conditions of confinement reflected regulatory purposes that were not inconsistent with parens patriae objectives.

for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer.[5] Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member or legal guardian comes forward. There is no analogue to a pretrial services report, however cursory. While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible. Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so.

Current procedures tend to deprive the minors of their interest in release in at least two major respects. First, there is no process there. While procedures provided by the executive in immigration matters are rarely held inadequate, *Landon*, 459 U.S. at 33, *some* process is due. *See Carlson v. Butterfield*, 342 U.S. 524, 538, 72 S. Ct. 525, 96

[5] Subsection 242.24(b)(4) provides for a decision on release to an adult other than a parent, guardian or relative to be made by the district director or chief patrol agent. The INS suggests no reason why this determination could not be made in conjunction with the prima facie evidence hearing.

L. Ed. 2d 547 (1952). Nothing in this regulation triggers any determination at any particular time of whether an alien juvenile who is presumptively eligible, for release, but has no family, may be released to the custody of an unrelated adult who will agree to her care and appearance. Nor is there is any light at the end of the tunnel; there is no time limit on continued detention, despite the child's eligibility for release. For all that appears from the regulations, the juvenile without parent, guardian or relative is left in procedural limbo. Second, there is no provision for reasoned consideration by a neutral hearing officer. Time limits and impartiality are not uncommon procedures; both are basic safeguards against arbitrary action. *See, e.g., Salerno*, 481 U.S. at 751-52; *Schall*, 467 U.S. 257 n.3, 270.[6] To omit both increases the risk that the juvenile for whom detention is not needed and for whom there is a prospective adult willing to assume care and assure appearance will not be released because of inattention, inadvertence or intransigence.

With these protections in place, I see no problem with the regulation's failure to put the burden of proof on the government. I do not construe § 242.24(b)(4)'s mention of "unusual and compelling circumstances" as requiring the child to show anything unusual about herself or about the adult ready to care for her. I interpret the phrase to be simply a shorthand reference to the admittedly unusual and compelling circumstances of a juvenile who has no parent, guardian, or adult relative to take custody upon release, as contrasted with juveniles who have such parties to be released to under subsection (b)(1). The INS itself characterizes mandatory release under (b)(1) as "routine."[7] By contrast, release to an unrelated adult

[6] *See supra* note 4.

[7] Supplemental Brief at 1 n.2.

under subsection (b)(4) is neither mandatory nor routine, but rather it is an "unusual and compelling" circumstance in which discretion must be exercised so as to assure the child's well-being as well as appearance. So construed, the "unusual and compelling" language does not infringe due process because it imposes no impediment to release that is unrelated to the juvenile's status and the government's interest.

Because immigration is involved, the government has a greater interest in using the procedures now in place than it might have in other civil matters, such as commitment proceedings, or in criminal cases. There is little question that the INS is not in the business of social work,[8] and its disinclination to play probation officer as well as prosecutor is quite understandable. Yet the obvious value that the Court has seen in the array of safeguards built into the Bail Reform Act, and the New York Family Court Act authorizing pretrial detention of accused juvenile delinquents, which it considered in *Salerno* and *Schall*, must have great weight against the modest imposition that a reasonable time limit, hearing before a neutral officer and a level playing field would entail. An examining officer who is obliged to be impartial is obviously available because conduct of the prima facie evidence hearing is entrusted to such a person.

Moreover, apart from inconvenience and perhaps some expense, there is no readily apparent reason why the INS cannot discharge its parens patriae obligations by seeking appointment of a guardian ad litem for minors in its custody. *See, e.g.*, Juvenile Justice and Delinquency

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[8] *Cf., e.g., Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (courts defer to decisions of qualified professionals, meaning a person competent to make particular decision at issue).

Prevention Act, § 504, codified at 18 U.S.C. § 5034 (providing that magistrate may appoint guardian ad litem if parent or guardian of juvenile is not present, will not cooperate, or has adverse interests to the juvenile); *Schall*, 467 U.S. at 276 n.25 (noting that under § 320.3 of the New York Family Court Act, if juvenile's parent or guardian fails to appear after reasonable and substantial efforts have been made to notify such person, court must appoint a law guardian for the child). The probable value of such a procedure would be appreciable, in that the otherwise unassisted juvenile would have some legally responsible adult to assist in making placement decisions—and the INS would correspondingly be relieved of the task of individualized decisionmaking that it does not want in any event. While it would be inappropriate for a court to impose such a procedure on the INS just because it makes sense to a judge, it is appropriate to consider the availability and practicality of different procedures in determining whether current procedures comport with minimum requirements of due process. *See Landon*, 459 U.S. at 35.

Considering current procedures and alternatives in light of the juveniles' interest in freedom from continued restraint and the government's in their well-being and appearance leads me to conclude that the balance tips against constitutional sufficiency of the process used by the INS in determining whether to release a child under § 242.24(b)(4). At a minimum, the juvenile who is presumptively eligible for release but has no parent or relative should be afforded an early hearing before a neutral officer. Unlike the majority or the district court, I would not remove the hearing officer's discretion, but that discretion should be informed by the government's interests in appearance and well-being and the juvenile's in release to a fully responsible adult.

Accordingly, I would affirm the district court's grant of summary judgment for Flores because the INS regulations fail to meet minimum requirements of procedural due process. I would strike those parts of the district court's judgment that rewrite § 242.24(b)(4) to require release to a "responsible adult party" who promises to bring the minor to future hearings and that mandate a probable cause hearing in place of the prima facie evidence hearing. I believe subsection (b)(4) as written affords greater flexibility and protection to minors in this respect than the order, because it permits release to any adult so long as that adult agrees to care for the child's well-being and to assure her presence. I would also strike the requirement of an administrative hearing to determine need for detention, and I would modify the order to require a prompt hearing before a neutral hearing officer to determine whether the minor should be released under § 242.24(b)(4) construed consistently with the constraints of due process.

WALLACE, Chief Judge, with whom Circuit Judges WIGGINS, BRUNETTI, and LEAVY join, dissenting:

The facts were adequately summarized in the majority panel opinion. *See Flores v. Meese,* No. 88-6249, slip op. 10747, 10761-68 (9th Cir. Sept. 7, 1990) (*Flores*). I have no quarrel with the majority's assertion that alien children allegedly in this country illegally are impacted by the regulation at issue and have a right to challenge their detention. *See* Maj. op. at 10790-93. But I find much of the majority's discussion, such as that regarding habeas corpus review, irrelevant to the crucial issues in this case, and other portions of the opinion lacking in support. I believe that the majority errs in implicitly defining the right at issue here as a blanket denial of liberty, thereby

granting it a fundamental character, and in ignoring the deference that courts have traditionally paid to immigration laws and regulations. Primarily for these reasons, I respectfully dissent.

I

My first disagreement with the majority is over the liberty right at issue. At oral argument, the alien children argued that the regulation impinged on their right to be free from physical restraint—a right to liberty which they allege is fundamental. The Immigration and Naturalization Service (INS), on the other hand, contended that the right at issue is a nonfundamental right to be released to unrelated adults. Without discussion, the majority adopts the former characterization, a characterization with which I disagree.

Perhaps the insistence on viewing the right at issue as a general "right to liberty" comes from the majority's mistaken characterization of the regulation as a "blanket detention policy." Maj. op. at 10781. As the facts demonstrate, however, the regulation results in no such blanket denial. The regulation does not bar the release of all alien juveniles, but merely those who do not have an identifiable parent, legal guardian or adult relative who can accept custody or designate an appropriate custodian. *See* 8 C.F.R. § 242.24 (1991). Even children whose release is not mandated under the regulation can, in the discretion of the INS, be released to other responsible adults. *See id.* § 242.24(b)(4). Thus, alien children awaiting deportation proceedings are eligible for release to a number of caregivers; the only liberty right denied them is the right to be released to unrelated adults without INS approval.

Given the limited scope of the regulation, I believe the majority errs by concluding that this case involves a

"fundamental right to be free from government detention." Maj. op. at 10794. This broad characterization of the right involved conflicts with the Supreme Court's warning that rights and interests should be defined narrowly for the purposes of substantive due process balancing. *See Bowers v. Hardwick,* 478 U.S. 186 (1986) (*Bowers*) (defining the right at issue as the right to engage in homosexual sodomy, rather than as the more general "right to be let alone"); *Michael H. v. Gerald D.,* 491 U.S. 110, 121-27 & n.6 (1989) (plurality opinion). The majority fails to heed this warning in holding, without persuasive analysis, that the right implicated by the regulation is a general right to liberty.

The need to define the right narrowly is further supported by policy and precedent. No case has been cited to us (and I have found none) in which a court has ever recognized a fundamental *substantive* due process right to physical liberty. Instead, *procedural* due process analysis has traditionally provided adequate protection against any unwarranted deprivations of physical liberty. As Justice Scalia recently stated, "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.' " *Cruzan v. Director, Missouri Department of Health,* 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring). To hold otherwise, would subject all physical detentions—in both the immigration context and criminal context—to judicial review under strict scrutiny to insure that their fundamental substantive due process "right to liberty" was not being infringed. Such cannot be the law.

None of the cases cited by the majority support its novel holding that this case involves a "fundamental right to be free from government detention." Maj. op. at 10794. For example, the majority cites a number of habeas corpus

cases to establish the unremarkable proposition that aliens may challenge a detention through a habeas corpus proceedings. *See, e.g., Wing Wong v. United States,* 163 U.S. 228, 233-38 (1896) (sentence of one year of hard labor for all deportable aliens may be challenged through habeas corpus petition). However, the existence of a forum is quite separate from the definition or analysis of the right at issue, and these cases provide no support for the majority's application of heightened scrutiny to invalidate the INS regulation. *Compare id.* at 235 ("[w]e think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid").

The majority also relies heavily on *Carlson v. Landon,* 342 U.S. 524 (1952) (*Carlson*), and *United States v. Salerno,* 481 U.S. 739 (1987) (*Salerno*), for the proposition that this case implicates the "fundamental right" to be free from detention. However, in both of the cited cases, the Supreme Court upheld, rather than struck down, a challenged detention. In addition, neither support the conclusion that the limited detention policy at issue here need satisfy any form of heightened scrutiny.

In *Carlson,* the Supreme Court held that INS detention based on Communist party membership did not violate due process. To reach this conclusion, the Court first held that Congress had authorized the Attorney General to make discretionary decisions concerning detention pending deportation. 342 U.S. at 540. Relying on the legislative history of the statute, the Court stated that "Congress [intended] to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." *Id.* Applying this test, the Court concluded that the discretion was "certainly broad enough" to justify the challenged detention. *Id.* at 541.

The majority argues that *Carlson* holds that "the INS cannot detain individuals without a particularized exercise of discretion through which it determines that detention of an individual would prevent harm to the community or further some other important governmental interest." Maj. op. at 10794. But such an inference is unsupported by either the reasoning, or the result in the case. As stated earlier, *Carlson* did not strike down the regulation, it found it well within the INS's discretion. In discussing the factors that supported the INS's exercise of discretion, the Court explicitly stated that such discretion "[could] only be overriden where it is clearly shown that it 'was without a reasonable foundation.' " *Carlson,* 342 U.S. at 541; *see also id.* (detention need not be justified by "specific acts" performed by detained individual). Thus, *Carlson* actually undermines, rather than supports, the majority's broad characterization of the right at issue in this case and consequent application of heightened scrutiny to invalidate the INS regulation.

The majority also cites *Salerno* in support of its holding that the INS must come forward with "significant" reasons to justify its limited detention policy. But *Salerno,* which upheld pretrial detention under the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, is not on point. First, *Salerno* involved a *blanket detention* of certain dangerous felons—the regulation at issue in this case is much narrower as it only prohibits release of alien minors to unrelated adults without INS approval. *Compare* 18 U.S.C. § 3142 *with* 8 C.F.R. § 242.24 (1991). Second, the Court's due process analysis in *Salerno* was geared primarily toward the rights of adult citizens facing detention in the criminal context. *See Salerno,* 481 U.S. at 747-52. The situation before us in this case involves the rights of juvenile aliens facing detention in the civil context, whose rights are not necessarily coextensive with those of adults.

See infra, sec. II. In addition, *Salerno* did not squarely hold that freedom from pretrial detention was a fundamental right. Instead, the Court stated that "we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 481 U.S. at 751 (quotations and citations omitted). Thus, *Salerno* also does not support the majority's assumption that the detention policy implicates a "fundamental right" to liberty.[1]

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[1] The additional cases cited by the two separate concurrences also do not support the majority's application of heightened scrutiny to invalidate the INS regulation. For example, *DeShaney v. Winnebago City Social Services Department,* 489 U.S. 189 (1989), only makes passing reference to "restraint[s] of physical liberty," when discussing situations where the state's affirmative exercise of power gives rise to a duty to protect. *Id.* at 199-200, *citing Youngberg v. Romero,* 457 U.S. 307 (1982) (state has duty to provide safe conditions to involuntarily committed mental patients). *DeShaney* cannot be read as establishing any general right to liberty; indeed, its holding only addresses the issue of whether the government's failure to confer aid violates due process. *Id.* at 202. *Board of Pardons v. Allen,* 482 U.S. 369 (1987), is also not on point, because it deals with *procedural due process* issues that arise after a statute has created a liberty interest. *Id.* at 372-73. *Allen* does not address any constitutionally-based substantive due process challenge. Other cases cited by the concurrences are similarly inapplicable here. *See Parham v. J.R.*, 442 U.S. 584, 600 (1979) (rejecting children's *procedural due process* challenge to state's procedures for involuntary commitment); *Greenholtz v. Inmates, Nebraska Penal & Correctional Complex,* 442 U.S. 1 (1979) (rejecting *procedural due process* challenge to parole release hearings).

One case cited by the concurrences does address an issue similar to the one before this court. In *Youngberg,* the Court articulated a standard for evaluating deprivations of liberty that occur during the course of an involuntary commitment. After holding that the liberty interest asserted by the inmate was protected by the due process clause, the Court stated that the challenged physical restraints would be upheld as long as the actions of the mental health therapists were reasonable.

The majority finally justifies its rejection of the INS's characterization of the right at issue by arguing that "the right to be released to unrelated adults" is merely the *remedy* the district court imposed in striking down the regulation. Maj. op. at 10796-97. But the majority misses the point of its remedy analysis. The district court imposed the remedy of release to unrelated adults only because it concluded that a right was being denied, the right to be released to such adults. I believe it makes more sense to view the right and consequent remedy as coexistent; if the right at issue was broader, the remedy imposed by the district court to correct for its denial would necessarily have been broader.

In light of these considerations, I analyze the regulation as resulting in a denial of the nonfundamental right to be released to unrelated adults unless the INS grants permission. *See Bowers,* 478 U.S. at 194-95 (warning against the expansion of the list of fundamental rights). Because no fundamental right is involved, we must apply minimal scrutiny to the regulation, and consider whether it is rationally related to any legitimate end of government. *Christy v. Hodel,* 857 F.2d 1324, 1329 (9th Cir. 1988), *cert. denied,* 490 U.S. 1114 (1989). Both the INS's desire to protect the safety of the detained children, as well as its concern for potential liability for harm that could befall a released child, are legitimate ends to which the regulation is rationally related. *See Flores,* slip op. at 10793-95; *see also infra,* sec. II. I therefore disagree with the majority's

457 U.S. at 316, 322. The Court stated: "the Constitution only requires that the courts make certain that professional judgment in fact was exercised . . . this standard is lower than the 'compelling' or 'substantial' necessity tests the Court of Appeals would require." *Id.* at 321-22 (quotations omitted). Thus, *Youngberg* actually undermines the position of the concurrences by demonstrating that deprivations of liberty need not be evaluated using heightened scrutiny.

conclusion that the INS regulation violates substantive due process.

II

Aside from its characterization of the right at issue as the fundamental right to liberty, I am further troubled by the majority's failure to recognize the special circumstances of this case. Two factors should influence our analysis of the constitutionality of the challenged regulation. First, the court's analysis should focus on the immigration context of this case, where judicial review is extremely limited. Second, the court must deal with the accepted principle that liberty interest is weighed differently for minors in comparison with adults.

A.

Flores's constitutional claims arise in the unique context of our immigration laws. The power over immigration is political in nature and therefore vested in the political branches. *Mathews v. Diaz,* 426 U.S. 67, 81-82 (1976) (*Diaz*); *Jean v. Nelson,* 727 F.2d 957, 965 (11th Cir. 1984) (en banc) (*Jean*), *aff'd on other grounds* 472 U.S. 846 (1985). Although the executive and legislative branches in theory possess concurrent authority over immigration, "[i]n practice . . . the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." *Jean,* 727 F.2d at 965; *see also United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 543 (1950).

The Supreme Court has long recognized Congress's paramount power to control matters of immigration. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977) (*Fiallo*); *Galvan v.*

Press, 347 U.S. 522, 531 (1954); *Carlson*, 342 U.S. at 534; *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952). Congressional power in this area is plenary; the Court has repeatedly stressed that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792, *quoting Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In exercising its broad power over immigration and naturalization, " 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id., quoting Diaz*, 426 U.S. at 80. Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject " 'only to narrow judicial review.' " *Id., quoting Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (*Hampton*); *Diaz*, 426 U.S. at 81-82.

The plenary power of Congress and the narrowness of judicial review in the immigration context is reflected in the Supreme Court's teaching that any substantive due process rights aliens might have are extremely limited. For example, in *Harisiades*, the Court upheld the deportation, under the Alien Registration Act of 1940, of legally resident aliens who had been members of the Communist Party before passage of the Act. While acknowledging that the Act "stands out as an extreme application of the expulsion power," the Court rejected the aliens' argument that the Congress's power to deport was "so unreasonably and harshly exercised" that the Act violated the due process clause. 342 U.S. at 588. Similarly, in *Galvan*, the Court upheld a statute that authorized deportation of legally resident aliens on the grounds that they had once been members of the Communist party, stating that "[w]e cannot say that this classification by Congress is so baseless as to be violative of due process." 347 U.S. at 529. In subsequent cases dealing with both equal protection and substantive due process challenges under the fifth amendment, the Supreme Court reaffirmed the limited judicial role in reviewing immigration decisions. *Fiallo*, 430 U.S. at 792-93 & n.4; *Hampton*, 426 U.S. 99-103.

As a result of the judiciary's limited role in the immigration context, we have held that even if the right at issue is fundamental in character, the court should not apply strict scrutiny review to an immigration regulation. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982), we considered the argument that substantive due process required the application of strict scrutiny to an immigration statute dealing with spouses. The homosexual plaintiffs argued that, as interpreted to apply only to heterosexual marriages, the statute violated their right to same-sex marriage, a right they contended was fundamental. We stated that "[w]e need not . . . reach the question of the nature of the claimed right or whether such a right is implicated in this case. *Even if it were*, we would not apply a strict scrutiny standard of review to the statute. [In the immigration area] the decisions of Congress are subject only to limited judicial review." *Id.* at 1041 (emphasis added and footnote omitted). Therefore, following *Adams*, and the extensive Supreme Court precedent in this area, even if I were to agree with the majority that this case involves a fundamental right, I would still apply rational review to the evaluate the regulation.

The majority's failure to defer to the INS is also demonstrated by its ready conclusion that neither of the INS's articulated reasons are "significant" enough to support the regulation. The majority first rejects the INS's belief that the regulation serves to protect the safety of the detained children. It assumes that release of the children to unrelated adults will be far preferable to detainment by the INS. Maj. op. at 10798-99. But the majority fails to cite

any evidence in the record to support its factual assumption. Indeed, there is none. More important, the INS thinks otherwise, and in keeping with prior precedent I would defer to its estimation of the risks involved. No one on this court can be sure there is no evil awaiting an unsuspecting alien minor in the custody of an unrelated adult. A concern about that possibility is not unreasonable. Simply put, the majority contends that it owes no deference to the INS's views on child safety because "[c]hild welfare is not an area of INS expertise." Maj. op. at 10798. This is a far too limited view of the deference owed to the INS, one that conflicts with the Supreme Court's statement that "*[a]ny policy* toward aliens is vitally and intricately interwoven" with matters that have "been committed to the political branches of the Federal Government." *Diaz,* 426 U.S. at 81 & n.17; *see also Carlson,* 342 U.S. at 538 (pointing out that "[d]etention is necessarily a part of [the] deportation procedure").

The majority ignores the fact that any judicial branch intrusion, even if explained by a belief that the INS has no special expertise, severely undermines congressional power over immigration. The majority's citation to *Hampton,* fails to support this intrusion, because that case dealt with the federal Civil Service Commission, not the INS. *See* 426 U.S. at 101 (recognizing political character of power over immigration, but rejecting argument that deference extends to "any agency of the National government"). I therefore disagree with the majority's casual conclusion that the INS must put forth affirmative evidence to demonstrate "that detention serves the best interests of members of the plaintiff class." Maj. op. at 10799. I would not strike down so easily the INS's efforts to protect the detained children, and would consider those efforts significant enough to support the regulation.

The majority also casually dismisses the INS's claim that releasing children to unrelated adults could result in tort liability. While acknowledging that the minors would have a cause of action against the INS for a violation of their rights, the majority finds the chance of tort liability "remote at best." Maj. op. at 10801, *quoting International Union, UAW v. Johnson Controls, Inc.,* 111 S. Ct. 1196, 1208 (1991). The sole support for this assertion is *DeShaney v. Winnebago City Social Services Department,* 489 U.S. 189 (1989) (*DeShaney*), where the Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

A careful reading of *DeShaney* reveals that the case has no bearing on the possibility that the INS will be held liable for releasing alien minors to unrelated adults. In holding that DeShaney had could not recover against the state welfare agency for its failure to remove him from an abusive home environment, the Court repeatedly emphasized that "the State played no part in creating [the danger]" and was not liable merely for its failure to confer aid. *Id.* at 196-97, 201. However, the Court was careful to distinguish DeShaney's case from one where the dangerous situation was created by the State action. In the latter situation, the Court was unwilling to foreclose liability, and instead stated that "[h]ad the State by the affirmative exercise of its power removed Joshua [DeShaney] from free society and placed him in a foster home operated by its agents, we might have a situation [that would] give rise to an affirmative duty to protect." *Id.* at 201 n.9. Thus, *DeShaney* clearly does not foreclose the possibility of INS liability for injury to a released child, when the harm occurred after the INS placed him or her in the care of an unrelated adult. *See id.*

The majority's assertion that the INS is unlikely to suffer any liability also seems odd in light of its holding that the INS must release minors to unrelated adults only after "mak[ing] the necessary determination of whether a party who is willing to assume custody is fit to do so." Maj. op. at 10800-01. In light of the majority's apparent acceptance of the INS's claim that it lacks the resources or expertise to conduct these studies, maj. op. at 10799, its imposition of a duty to do so seems likely to result in liability. At any rate, given our deferential review, I would defer to the INS's rationale for the policy rather than seeking out reasons to discredit it.

B.

In addition to failing to give required deference to the INS regulation, the majority accords no significance to the fact that this case involves detention of children, rather than adults. Because the INS's reasons for the policy relate directly to their responsibility to protect minors, I believe that the Supreme Court's teachings regarding the constitutional rights of minors are relevant to our analysis.

As the majority correctly points out, there is no doubt that children are " 'persons' under our Constitution" who possess "fundamental rights which the State must respect." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969); *In re Gault*, 387 U.S. 1, 13 (1967) ("whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). However, the majority fails to include in its analysis the Supreme Court's often stated teaching that constitutional rights of children are not coextensive with those of adults. *See, e.g., Schall v. Martin*, 467 U.S. 253, 263-66 (1984) (*Schall*); *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979) (plurality opinion) (*Bellotti*); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1978).

The Court has specifically recognized the narrower scope of juveniles' liberty interest. In *Schall*, the Court held that the state may restrict a child's liberty interest in order to secure that child's welfare. In upholding the constitutionality of a New York statute authorizing the pretrial detention of certain juveniles, the Court stated:

> The juvenile's . . . interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

467 U.S. at 265 (citations omitted), *quoting Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *see also Bellotti*, 443 U.S. at 634 (stating three reasons why "the constitutional rights of children cannot be equated with those of adults," including "the peculiar vulnerability of children").

In my view, the teachings of *Schall* and *Bellotti* are particularly relevant to the facts of this case. The INS's regulation governing the detention of minors is based at least in part upon a concern for the "peculiar vulnerability" of alien minors. *See Bellotti*, 443 U.S. at 635 ("the State is entitled to adjust its legal system to account for children's vulnerability . . ."). Thus, the INS's regulation is an exercise of governmental power which takes into account the need to provide for children "[when] parental control falters." *Schall*, 467 U.S. at 265.

The majority ignores these cases, and instead relies on *In re Gault,* for the proposition that "children should be treated in a manner least restrictive of liberty." Maj. op. at 10798. *In re Gault* dealt with a procedural, rather than substantive, due process challenge, and I am at a loss to find any categorical statement concerning the liberty rights of children in the text of the opinion. *Compare In re Gault,* 387 U.S. at 13 (stating that bill of rights does not apply in same manner to children as adults). Moreover, since *In re Gault* was decided, the Supreme Court has made it clear that childrens' liberty interests are not identical to those of adults. *Schall,* 467 U.S. at 265.

The majority also relies heavily on federal and state policies which, it claims, "favor[ ] avoidance of institutionalization of juveniles." Maj. op. at 10796. However, even assuming the existence of such policies, they are irrelevant to our analysis. The question presented here is what the Constitution requires, not what federal and state governments favor. *See DeShaney,* 489 U.S. at 202-03 (drawing distinction between duties imposed by state legislature and duties embodied in the Constitution). I therefore fail to see how legislative policy "compels the conclusion that" the plaintiffs' status as minors is irrelevant to our assessment of their constitutional rights. Maj. op. at 10796.

Thus, I believe that the Supreme Court's rulings regarding the diminished liberty interests of minors should be factored into our constitutional analysis. The majority therefore errs in asserting that there is "no legal basis" for the INS's professed concern for the best interests of alien minors. Maj. op. at 10797. Because the INS's statement of reasons for the limited detention policy are concerns that the Supreme Court has already found legitimate, this is additional evidence that the challenged regulation is reasonable.

III

In the final section of the opinion, the majority upholds the district judge's ruling that a minor taken into custody must be given "an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release." Although the district judge's ruling apparently rested on the procedural due process test embodied in *Gerstein v. Pugh,* 420 U.S. 103 (1975), *see Flores,* slip op. at 10798, the majority sees no need to determine whether *Gerstein* applies in this case. Instead, the majority concludes that the new procedural requirements are logically connected to its holding that the INS may not detain minors solely on the ground that there is no adult or legal guardian to care for the child. Maj. op. at 10801-02.

The majority states that requiring detention hearings does not materially alter existing INS regulations. Maj. op. at 10802. In reaching this conclusion, the majority holds that the district judge's order only imposes two additional requirements on the INS. First, the order makes detention hearings mandatory, when the hearings were previously only available at the request of the minor. *Id.*; *see* 8 C.F.R. § 242.2(c) & (d) (1991). Second, the order requires that the hearing include an inquiry into whether a nonrelative may be appropriate to take custody of the child. Maj. op. at 10802.

As stated earlier, I do not agree that the INS regulation at issue here violates substantive due process. I therefore cannot join in the majority's imposition of these new procedural requirements. However, the majority's analysis is problematic for a second reason—it fails to acknowledge, much less analyze, the possible broader implications of the judge's order. This issue needs to be clarified.

The district judge held that "[a]ny minor taken into custody" shall be given "an administrative hearing to determine probable cause for his arrest." Under current INS procedures, minors arrested without a warrant are entitled to have probable cause reviewed by an immigration official "without unnecessary delay." *See* 8 U.S.C. §1357(a)(2). Because this procedure existed prior to the *Flores* litigation, the panel speculated that the district judge intended to impose an additional requirement that the probable cause hearing take place before an immigration judge. Otherwise, the majority pointed out that "the injunction [would be] deprive[d] of much practical effect." *Flores,* slip op. at 10798.

By holding that the judge's order will not materially affect INS procedures, the majority implicitly rejects the panel's original assumption and holds instead that the current arrest and probable cause requirements satisfy the judge's order. Any other interpretation of the order is inconsistent with the majority's refusal to engage in any due process analysis. Therefore, despite the broad language of the judge's order, the majority's affirmance of that order should not be read to require any change in these procedures.

I also do not read the majority's opinion as imposing any additional requirements on the INS in terms of timing and execution of the detention hearings. The majority references the current hearing procedures as adequate to safeguard the interests of the minors. *See* maj. op. at 10802. Therefore, with the exception of the new requirement that such hearings be held automatically, the majority opinion does not entail any alteration in current INS procedure.

The procedural component of the district judge's order is potentially quite sweeping. For this reason, I adhere to

my original position, as stated in the panel majority opinion, that we should remand the case for a determination of what procedures are constitutionally required under *Mathews v. Eldridge,* 424 U.S. 319 (1976). *See Flores,* slip op. at 10797-802 (discussing appropriate test for procedural due process analysis).

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 88-6249

JENNY LISETTE FLORES, A MINOR, BY NEXT FRIEND MARIO HUGH GALVEZ-MALDONADO; DOMINGA HERNANDEZ-HERNANDEZ, A MINOR, BY NEXT FRIEND JOSE SAUL MIRA; ALMA YANIRA CRUZ-ALDAMA, A MINOR, BY NEXT FRIEND HERMAN PERILILO TANCHEZ, PLAINTIFFS-APPELLEES

v.

EDWIN MEESE, III; IMMIGRATION & NATURALIZATION SERVICE; HAROLD EZELL, DEFENDANTS-APPELLANTS

Argued and Submitted April 5, 1989
Decided June 20, 1990
As Amended Sept. 7, 1990

Class of alien minors brought suit challenging Immigration and Naturalization Service (INS) regulation governing release of detained alien minors. The United States District Court for the Central District of California, Robert J. Kelleher, J., granted summary judgment to aliens, holding that regulation violated substantive due process, and ordered modifications to the regulation. Attorney General and INS appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) INS did not exceed its authority in issuing regulation; (2) regulation did not

violate substantive due process; and (3) Supreme Court's *Gerstein* decision holding that Fourth Amendment required review, by neutral and detached magistrate, of probable cause for arrest prior to any extended restraint of liberty following arrest did not apply.

Reversed and remanded.

Fletcher, Circuit Judge, filed dissenting opinion.

See also 681 F.Supp. 665.

Opinion, 913 F.2d 1315, superseded.

Ian Fan, Asst. U.S. Atty., Los Angeles, Cal., for defendants-appellants.

Carlos Holguin, Nat. Center for Immigrants' Rights, Inc., Los Angeles, Cal., for plaintiffs-appellees.

Appeal from the United States District Court for the Central District of California.

Before WALLACE and FLETCHER, Circuit Judges, and LLOYD D. GEORGE,* District Judge.

WALLACE, Circuit Judge:

The Attorney General and Immigration and Naturalization Service (INS) appeal the district court's summary judgment to a plaintiff class of alien minors whose named representative is Jenny Flores (Flores). The district court held that an INS regulation governing the release of detained alien minors violates substantive due process, and ordered modifications to the regulation. The district court also held that INS procedures fell short of the requirements of procedural due process, and therefore ordered the INS "forthwith" to provide to any minor in custody an "administrative hearing to determine probable cause for

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* Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

his arrest and the need for any restrictions placed upon his release." On appeal, the INS challenges both of the district court's holdings. The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We reverse and remand.

I

The case arises out of the INS's efforts to deal with the growing number of alien children entering the United States by themselves or without their parents (unaccompanied alien minors). Pursuant to 8 U.S.C. §§ 1357(a)(2) and 1252(a)(1), INS agents may arrest and detain aliens, including alien minors, whom they suspect may be deportable. Section 1252(a)(1) provides that

> any such alien taken into custody may, in the discretion of the Attorney General and pending . . . final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

8 U.S.C. § 1252(a)(1) (emphasis added). Section 1252(a)(1) also authorizes the Attorney General, "in his discretion" and "at any time," to revoke an alien's bond or parole. Plaintiffs are a class of alien minors who are being detained without bail by the INS pending deportation proceedings. The conditions of the plaintiffs' confinement are not at issue in this case. The issue is whether, and in what manner, the plaintiffs may be detained.

Section 1252 applies to *deportable* aliens only. Under our immigration laws, there is a fundamental distinction between "excludable" and "deportable" aliens and a

corresponding distinction between exclusion and deportation proceedings. *See* 1 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 1.03[7] (rev. ed. 1989). *Compare* 8 U.S.C. §§ 1221-1230 (provisions relating to entry and exclusion) *with id.* §§ 1251-54 (provisions relating to deportation). Excludable aliens are those who have not "entered" the United States as that term is used in the immigration laws. *See Leng May Ma v. Barber,* 357 U.S. 185, 187-90, 78 S.Ct. 1072, 1073-75, 2 L.Ed.2d 1246 (1958); 8 U.S.C. § 1101(a)(13). By contrast, deportable aliens are those who have entered the United States but whose presence violates the immigration laws. At issue in this case are the statutory provisions governing, and the rights of, deportable aliens only.

Under the statutory framework governing detention of deportable aliens, an alien detained pending deportation proceedings may obtain judicial review of a detention or bond release decision "upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." 8 U.S.C. § 1252(a)(1). Because this provision "deals only with complaints about delays in determining deportability in individual cases," it does not foreclose a challenge to an INS regulation brought under 28 U.S.C. § 1331 rather than in habeas corpus proceedings. *National Center for Immigrants Rights, Inc. v. INS,* 743 F.2d 1365, 1368-69 (9th Cir.1984). After an order of deportation against an alien has been made final, the Attorney General is authorized to detain that alien for up to six months. 8 U.S.C. § 1252(c). After the six months has elapsed, the Attorney General must release the deportable alien but may thereafter supervise him. 8 U.S.C. § 1252(d).

The Attorney General is authorized by Congress to establish regulations which are necessary to carry out his authority under the immigration laws. 8 U.S.C. § 1103(a). The Attorney General may delegate his responsibilities to other executive officers and indeed has delegated much of his authority over immigration to the Commissioner of the INS, who in turn has authorized the Deputy Commissioner to exercise the same degree of power, 8 U.S.C. § 1103(a); 8 C.F.R. § 100.2(1988); *see also Patel v. INS*, 638 F.2d 1199, 1201 & n. 1 (9th Cir.1980).

Under 8 U.S.C. § 1252(a)(1), the Attorney General may continue a deportable alien in custody and prescribe bond release conditions. Prior to 1984, no national policy existed regarding when an alien minor in deportation proceedings could be released on bail. By contrast, regulations did exist governing the release of alien minors who were in exclusion proceedings. *See* 8 C.F.R. § 212.5(a)(2)(ii) (1987).

In 1984, the INS's Western Region adopted a policy governing release of detained alien minors in deportation proceedings. The policy provided that

> [n]o minor shall be released except to a parent or lawful guardian. This is necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability.
>
> District Directors and Chief Patrol Agents are authorized, in unusual and extraordinary cases, to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child. Release shall not be permitted if any doubt exists that the child will be properly protected.

Four plaintiffs, including named plaintiff Flores, filed this class action on July 11, 1985. The district court subsequently certified a class of alien minors comprising

> [a]ll persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the [INS] within the INS' Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.

Flores's complaint contained seven claims, only the first two of which are relevant to this appeal. The first claim alleged that the Western Region's bond release condition violated the Immigration & Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 552 *et seq.*, the fifth amendment's due process clause and equal protection guarantee, and international law. Flores's second claim challenged the INS's failure to provide (1) "prompt written notice" to the detainee that the bond release condition had been imposed, and (2) "prompt, mandatory, neutral and detached" review following arrest of (a) whether probable cause to arrest existed, (b) whether imposition of the bond condition was necessary to ensure future appearance, and (c) whether any available adult was suitable to ensure the detained juvenile's well-being and appearance at future proceedings. The second claim alleged that these failures violated due process and international law. Plaintiffs' last five claims, which challenged various conditions of the minors' confinement, including the INS's provision for education, recreation, and visitation, were resolved by settlement or motion and are not issues in this appeal.

The INS moved for partial summary judgment, and the district court held that the bond release condition did not violate the INA, APA, or international law, but deferred decision on the due process and equal protection claims until further discovery had been conducted.

Flores subsequently moved for summary judgment on various grounds, and the district court ruled that the bond release condition embodied in the Western Region's policy violated equal protection since no rational reason existed for treating alien minors in exclusion proceedings differently from alien minors in deportation proceedings. Under 8 C.F.R. § 212.5(a)(2)(ii) (1987), alien minors in exclusion proceedings could be paroled to persons other than parents or legal guardians, including relatives such as sisters or brothers as well as non-relatives. Pointing to the fact that the INS had no uniform policy governing the release of alien minors, the district court ordered the INS to treat minors in deportation under the exclusion standards.

Thereafter, on October 15, 1987, the INS published in the *Federal Register* a proposed rule "to codify Service policy regarding detention and release of juvenile aliens and to provide a single policy for juveniles in both deportation and exclusion proceedings." 52 Fed.Reg. 38,245 (proposed Oct. 15, 1987). Comments upon the proposed regulation were requested. *Id.*

Flores moved for summary judgment on the due process issues, which the INS opposed and cross-filed for summary judgment. At the hearing on the motions, the district court was advised that the INS was in the process of publishing the final version of the alien minor detention regulation, and the district court ordered that a copy of the new regulation be filed. The final regulation was published in the *Federal Register* on May 17, 1988, and a copy of it was filed with the district court on the same date. Detention and Release of Juveniles, 53 Fed.Reg. 17,449 (1988). The regulation is now codified at 8 C.F.R. § 242.24 (1989).

The final regulation,[1] which differs only slightly from the proposed regulations, governs release of alien "juve-

[1] The final regulation provides in part:

§ 242.24 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile had identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

8 C.F.R. § 242.24 (1989).

niles," defined as aliens under the age of 18. 8 C.F.R. § 242.24 (1988). It provides that an alien minor "for whom bond has been posted . . . or who ha[s] been ordered released on recognizance" would be released, in order of preference, to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, grandparent), provided such person is not in INS detention. *Id.* However, even if such a person is available to accept custody, release will not take place if "a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others." *Id.* The INS retains discretion in "unusual and compelling circumstances" to release a juvenile to an adult who is not a parent, legal guardian or adult relative, so long as the adult "executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge." *Id.*

The supplementary information section of the final regulation explained that "the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings." 53 Fed.Reg. 17,449. It cautioned, however, that

> with respect to juveniles a determination must also be made as to whose custody the juvenile should be released. On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released. This rule strikes a balance by providing a list of appropriate custodians while maintaining the discretion of the District Director or the Chief Patrol Agent to release a juvenile to an adult other than those

> listed individuals in unusual and compelling circumstances.

Id. The supplementary information section also summarized various comments on the regulation which had been accepted or rejected. It stated that the INS had rejected the suggestion of several commentators that the list of custodians be expanded to include "any responsible adult." *Id.* It explained that the INS "has attempted to provide for release to those individuals considered responsible for the juvenile's welfare. Release to others . . . on a routine basis, would require the performance of home studies for which the Service is neither adequately funded nor qualified." *Id.*

The parties filed supplemental briefs on the effect of the new regulation, and the district court, in a brief, one and one-half page order, granted summary judgment to Flores on her first and second claims "on due process grounds."

We review the entry of summary judgment de novo. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir.1989) (en banc). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We must view the evidence in the light most favorable to the nonmoving party. *Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 856 F.2d 78, 80 (9th Cir.1988).

II

Flores first urges us to affirm the district court's modification of section 242.24 on nonconstitutional grounds. In *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), the Supreme Court cautioned that " '[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' " *Id.* at 854, 105 S.Ct. at 2997, *quoting Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2199, 68 L.Ed.2d 693 (1981). The Court characterized this as a " 'fundamental rule of judicial restraint.' " *Id., quoting Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984). The INS concedes that we may consider the nonconstitutional argument in this appeal.

Arguing that the INS lacks statutory authority to issue the minor detention regulation, Flores seeks to invoke our prior decision in *National Center for Immigrants' Rights v. INS*, 791 F.2d 1351 (9th Cir. 1986) (*National Center*), *cert. granted and vacated*, 481 U.S. 1009, 1009-10, 107 S.Ct. 1881, 1882, 95 L.Ed.2d 489 (vacating and remanding for reconsideration in light of Immigration Reform and Control Act of 1986), *on remand*, 818 F.2d 869 (9th Cir. 1987) (remanding to district court). In *National Center*, we held that the INS exceeded its statutory authority in promulgating a blanket "no-work" bond condition for aliens in deportation proceedings. Despite broad authorization in the statute, we relied on legislative history in holding that the Attorney General's authority "is limited to the imposition of bond conditions which tend to insure the alien's appearance at future deportation proceedings." 791 F.2d at 1356. Flores argues that because the INS regulation at issue in this case does not insure the alien's appearance at deportation proceedings, the INS exceeded its authority in issuing this regulation.

Because the Supreme Court vacated our decision in *National Center*, that decision no longer has any legal effect. "The effect of vacating the judgment below is to take away from it any precedential effect." *Troy State University v. Dickey*, 402 F.2d 515, 516 (5th Cir.1968); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 41, 71 S.Ct. 104, 107, 95 L.Ed. 36 (1950) (stating that motion to vacate judgment "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from *spawning any legal consequences*") (emphasis added). Thus, we may not rely on *National Center*'s precedential value as a basis for affirming the district court.

Congress has delegated exceptionally broad rulemaking and enforcement powers to the Attorney General under the immigration laws. *See Bilbao-Bastida v. INS*, 409 F.2d 820, 822 (9th Cir.), *cert. dismissed*, 396 U.S. 802, 90 S.Ct. 21, 24 L.Ed.2d 59 (1969); *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1500 (D.C.Cir.1988) (en banc); *Amanullah v. Nelson*, 811 F.2d 1, 4-5 (1st Cir.1987). Under section 1103(a), the Attorney General is authorized to "establish such regulations . . . as he deems necessary for carrying out his authority" under chapter 12 of title 8 of the United States Code, 8 U.S.C. §§ 1101-1503. *See also* H.R.Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.Code Cong. & Admin.News 1653, 1687.

In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973), the Supreme Court set forth the standard for evaluating the validity of an agency regulation "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act.' " *Id.* at 369, 93 S.Ct. at 1660. The Court concluded that "the validity of a regulation promulgated thereunder will be sustained so

long as it is 'reasonably related to the purposes of the enabling legislation.' " *Id.* (footnote omitted), *quoting Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 280-81, 89 S.Ct. 518, 526; 21 L.Ed.2d 474 (1969); *see also Holy Cross Hospital-Mission Hills v. Heckler*, 749 F.2d 1340, 1344 (9th Cir. 1984). In *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir.1972) (*Sam Andrews' Sons*), we articulated a similar standard of review for regulations promulgated in the area of immigration—an area where the Executive Branch possesses residual constitutional authority because of its foreign affairs powers. *See Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir.1984) (en banc) (*Jean*), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). In *Sam Andrews' Sons*, we stated that the Attorney General's regulations promulgated under the INA "must be upheld if they are founded 'on considerations rationally related to the statute he is administering.' " 457 F.2d at 748, *quoting Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (*Fook Hong Mak*); *see also Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C.Cir. 1979) (*Narenji*) (same), *cert. denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980). Thus, we need only inquire as to whether the considerations underlying the INS's regulation are rationally related to the statute.

In arguing that section 242.24 does not exceed his rulemaking authority, the Attorney General does not rely upon the general rulemaking authority granted by section 1103(a) alone. Instead, he argues that the detention regulation is one "he deems necessary for carrying out his authority" specifically granted by 8 U.S.C. § 1252(a)(1), which empowers him "in his discretion" to "continue[ ] in custody" an alien arrested under warrant, or to release such alien "under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe." 8 U.S.C § 1252(a)(1). Flores counters by arguing that section 1252(a)(1) authorizes only those bond release conditions which serve the sole purpose of ensuring the alien's future appearance at deportation proceedings.

While both parties characterize the INS regulation as imposing a "bond release condition" on alien juveniles, we conclude that the INS regulation actually is closer to a *condition of bail or a condition for release*, at least as applied to the plaintiff class. That is, the regulation does not impose a condition upon plaintiffs which restricts their activities *after* release; instead, it *bars* such release in the first place. *See Matter of Toscano-Rivas*, 14 I & N Dec. 523, 527 (B.I.A.1972), *on reconsideration*, 14 I & N Dec. 538, 539-41 (B.I.A. 1973), *aff'd on other grounds*, 14 I & N Dec. 550, 555 (A.G.1974) (*Toscano-Rivas)* (distinguishing between detention and bond release conditions). Thus, in contrast to the regulation analyzed in *National Center*, the regulation at issue in this case derives primarily from the Attorney General's detention power rather than from his power to prescribe bond conditions. However, since the Attorney General's detention and bond release condition powers are interrelated, and their statutory evolution intertwined, we will examine them together.

Our review of both the language and legislative history of section 1252(a)(1) discloses no intent to limit the Attorney General's power to detain arrested aliens pending deportation proceedings to those situations where detention is necessary to ensure the alien's future appearance. We begin with the language of section 1252(a)(1). The language is extremely broad in authorizing the detention and release on bond of aliens pending deportation proceedings. It provides that *"any* . . . alien taken into custody may, *in the discretion of the Attorney General* and pending . . . final determination of deportability, (A) *be continued in custody*; or (B) be released under bond in the amount of not less than $500 with security approved

by the Attorney General, *containing such conditions as the Attorney General may prescribe.*" 8 U.S.C. § 1252(a)(1) (emphasis added). This language discloses no limitation on the Attorney General's detention powers before an order of deportation is made final, except perhaps that implied by the word "discretion." *See Carlson v. Landon*, 342 U.S. 524, 540-41, 72 S.Ct. 525, 534, 96 L.Ed. 547 (1952) (*Carlson*) (Attorney General's exercise of discretion "can only be overridden where it is clearly shown that it 'was without a reasonable foundation.' "); *Rubinstein v. Brownell*, 206 F.2d 449, 455 (D.C.Cir.1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954). Section 1252(a)(1)'s language certainly does not explicitly or implicitly limit the Attorney General's power to detain to situations where it is necessary to ensure the alien's future appearance.

While section 1252(a)(1) specifically authorizes the Attorney General to prescribe bond release conditions, it does not authorize him to prescribe conditions for release. Instead, the Attorney General is simply authorized, in his discretion, to continue aliens in custody, that is, to deny release pending deportation proceedings. We do not view this as an obstacle to the regulation's validity, however. As mentioned above, section 1103(a) generally authorizes the Attorney General to make regulations which "he deems necessary" to carry out his authority under the immigration laws. 8 U.S.C § 1103(a). In light of the broad mandate of section 1103(a), "[t]he statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him." *Narenji*, 617 F.2d at 747.

Nor does the rather complicated legislative history disclose such a limited congressional purpose behind section 1252(a)(1). Section 1252(a)(1) in its present form derives principally from section 242(a) of the INA. Con-

gress's purpose in passing the INA was "to enact a comprehensive, revised immigration, naturalization, and nationality code." H.R.Rep. No. 1365, *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1653. The particular purpose behind section 242 of the INA was to enact "detailed and comprehensive provisions relating to the apprehension and deportation of aliens who are within the deportable classes." *Id.* at 1711.

Section 242(a) of the INA had a rather complex genealogy. Its origins can be traced to section 20 of the Immigration Act of 1917. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917). Section 20 authorized the Department of Labor, then the administering agency, to release an individual on bond pending deportation proceedings. *Id.* The 1917 Act provided that the alien "may be released under a bond in the penalty of not less than $500 with security approved by the Secretary of Labor, *conditioned that such alien shall be produced* when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States." *Id.* at 891 (emphasis added). The 1917 Act did not explicitly authorize detention; it did so only by implication, by specifying that release on bond was permissible. The Act required as a bond release condition that the alien agree to appear at subsequent proceedings but was silent in regard to the power to impose other conditions.

In 1950, Congress amended section 20 of the 1917 Act through passage of the Subversive Activities Control Act (SACA), enacted as Title I of the Internal Security Act of 1950. Internal Security Act of 1950, Pub.L. 81-831, § 23, ch. 1024, 64 Stat. 987, 1010-12 (1950), *reprinted in* 1950 U.S. Code Cong. & Admin.Serv. 984, 1005-07. The Internal Security Act's purpose was to "deport all alien Communists as a menace to the security of the United States

. . . . " *Carlson*, 342 U.S. at 541, 72 S.Ct. at 534. Of particular importance to our inquiry is section 23 of SACA, since section 242(a) of the INA was patterned after it. As the House Report stated, "[section 242], in general, follows the procedure established by section 23 of [SACA].". *See* H.R.Rep. No. 1365, *reprinted in* 1952 U.S.Code Cong. & Admin.News at 1711.

Section 23 of SACA amended section 20 of the 1917 Act to read in part:

> Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General. . . . It shall be among the conditions of any such bond . . . that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody . . . and for deportation if an order for his deportation has been made.

SACA § 23, *reprinted in* 1950 U.S.Code Cong. & Admin.News 984, 1006. Section 23 expanded the Attorney General's powers in several important ways. First, it expressly authorized detention of aliens pending a final determination of deportability. Second, it clarified that a mandatory condition of every release on bond was that the alien agree to appear at future deportation proceedings, and it implied that other bond conditions could be prescribed. Third, by adding various references to the Attorney General's "discretion," section 23 clarified that decisions regarding detention and release on bond were matters committed to the discretion of the Attorney General. The added reference to the Attorney General's "discretion" was also meant to resolve a split in the circuits by overruling a Sixth Circuit case which had held that the absence of such language in section 20 of the 1917 Act indicated a congressional intent to grant aliens a right to bail pending deportation proceedings. *Carlson*, 342 U.S. at 539, 72 S.Ct. at 533-34.

The legislative history on section 23 of SACA is sparse. The conference report contains little more than a terse statement of Congress's purpose in expanding the Attorney General's powers under section 23: "to provide more effective control over, and to facilitate the deportation of, deportable aliens." H.R.Conf.Rep. No. 3112, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong.Serv. 3886, 3899, 3911. In *Carlson*, the Supreme Court traced the language of section 23 of SACA back to virtually identical language in the Hobbs Bill, H.R. 10, 81st Cong., 1st Sess., a precursor to SACA which was introduced by Representative Hobbs on January 3, 1949, but never enacted. *Carlson*, 342 U.S. at 538-39, 72 S.Ct. at 533-34. In *Carlson*, the Court looked to the legislative reports on the Hobbs Bill in interpreting the Attorney General's bail power under SACA. *Id.* at 538-39 & n.32, *quoting* H.R.Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S.Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950). Thus, although the Hobbs Bill was never enacted, its legislative history is "wholly relevant" to an understanding of SACA, a subsequent statute, since the operative language in both was substantially the same. *See United States v. Enmons*, 410 U.S. 396, 404 n. 14, 93 S.Ct. 1007, 1012 n. 14, 35 L.Ed.2d 379 (1973); *Toscano-Rivas*, 14 I & N Dec. at 554 n. 13 ("[T]he reports on H.R. 10 can appropriately be regarded as part of the legislative history of [SACA]."). This is especially true in this case, since the relevant language of

section 23 of SACA governing release was taken verbatim from the Hobbs Bill. *Compare* SACA § 23, *reprinted in* 1950 U.S.Code Cong.Serv. 984, 1005, *with* H.R.Rep. No. 1192, 81st Cong., 1st Sess. 2 (1949).

An examination of the House and Senate Reports on the Hobbs Bill reveals that Congress intended the Attorney General's power to detain and formulate bond conditions to be exceptionally broad. *See* H.R.Rep. No. 1192, 81st Cong., 1st Sess. (1949); S.Rep. No. 2239, 81st Cong., 2d Sess. (1950). Both reports contained the same explanation of how the bill would alter the 1917 Act:

> Existing law merely states generally that pending the final disposal of the case of any alien so taken into custody, he may be released under a bond of not less than $500, with security approved by the Attorney General, and conditioned that he shall be produced when required for a hearing on the charges against him and for deportation if found unlawfully in this country.
>
> . . . Th[is] bill will *expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody,* or to release them under bond . . ., pending final determination of their deportability and for a 6-month period after an order of deportation is issued . . . . The bill further provides that *among* the conditions of any bond exacted . . . there shall be a condition that the alien shall be produced when required for defense against the charges upon which he appears to be deportable and for deportation if he is found subject to that action. . . . These provisions, of course, enumerate *only one* of the conditions which is mandatory in the bond or as a parole condition. The bill intends that the Attorney General shall

> have *full discretion* in imposing *any other conditions or terms* in the bond or parole agreement *which he may see fit to include*. Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information. Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished. The bill intends that the Attorney General shall have *untrammeled authority* to impose *such conditions or terms as he sees fit* in releasing an alien under bond . . . pending final determination of the deportability of the alien and for six months after an order of deportation has been issued against him.

S.Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added); *see also* H.R.Rep. No. 1192, 81st Cong., 1st Sess. 5-6 (1949).

To summarize, the Hobbs Bill, upon which section 23 of SACA was patterned, was meant to confer broad power upon the Attorney General to detain aliens prior to a final determination of deportability. Section 242(a) of the 1952 INA carried forward the provisions of section 23 of SACA. In its final form, section 242(a) did, however, include additional language which made explicit what had been only implicit in its predecessor provisions: that the Attorney General was authorized to prescribe bond conditions beyond merely ensuring appearance. *See* INA § 242(a), *reprinted in* 1952 U.S.Code Cong. & Admin.News 166, 208-09 (authorizing "release[ ] under bond in the amount of not less than $500 with security

approved by the Attorney General, *containing such conditions as the Attorney General may prescribe*") (emphasis added).

In *Carlson*, the Supreme Court, after reviewing the legislative history of section 23 of SACA, concluded that "the language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." 342 U.S. at 540, 72 S.Ct. at 534. "Courts that have reviewed decisions denying aliens bail since the 1952 Act have, apparently unanimously, transferred the presumption [of correctness] to cases under that Act." *United States ex rel. Barbour v. District Director of the INS*, 491 F.2d 573, 577-78 (5th Cir.), *cert. denied*, 419 U.S. 873, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974).

Despite the broad authorization to detain and set conditions of bond reflected by the statutory language and legislative history, *see also id.* at 577, the Attorney General's detention power is not limitless. *See Carlson*, 342 U.S. at 544, 72 S.Ct. at 536 (in upholding Congress's delegation of power to Attorney General under Subversive Activities Control Act to hold subversive resident aliens without bail, observing that "[t]he authority to detain without bail is to be exercised within the framework of the . . . Act to guard against Communist activities pending deportation hearings."). Thus, while the Attorney General may not act in a manner "totally unrelated to the various purposes of the immigration laws," *Toscano-Rivas*, 14 I & N Dec. at 554, he does have broad discretion in acting to fulfill the purposes of those laws.

In light of the foregoing, we reject Flores's argument that any regulation structuring the Attorney General's discretion to detain arrested aliens pending deportation proceedings exceeds his statutory authority unless it serves the *sole* purpose of ensuring the alien's future appearance

at deportation proceedings. There is no question that one, and perhaps the primary, purpose of detention under section 1252(a)(1) is to ensure the future appearance at deportation proceedings. *See id.* 342 U.S. at 542, 72 S.Ct. at 535. In *Carlson*, however, the Supreme Court endorsed a broader concept of the Attorney General's discretion to refuse release than that advanced by Flores. The Court there explained that "the discretion reposed in the Attorney General [to deny release under SACA] is at least as great as that found by the Second Circuit in the *Potash* case, *supra*, to be in him under the former bail provision [section 20 of the Immigration Act of 1917]." 342 U.S. at 540, 72 S.Ct. at 534. On the opinion's preceding page, the Court had quoted a passage from *United States ex rel. Potash v. District Director of INS*, 169 F.2d 747 (2d Cir.1948) (*Potash*), which read:

> The discretion of the Attorney General . . . is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

Carlson, 342 U.S. at 539-40 n. 33, 72 S.Ct. at 534 n. 33, *quoting Potash*, 169 F.2d at 751. Since these factors go beyond merely ensuring the appearance at future proceedings, Flores's argument fails.

We next consider whether the INS's regulation is "founded 'on considerations rationally related to the statute [it] is administering.' " *Sam Andrews' Sons*, 457 F.2d at 748, *quoting Fook Hong Mak*, 435 F.2d at 730. We conclude that it is. The regulation is rationally related to the purpose of ensuring the detained minor's appear-

ance at future proceedings. The supplementary information section of the final regulation clearly explains that "the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings." 53 Fed.Reg. at 17,449. Although under section 242.24(b)(1), a juvenile may be released to a parent, legal guardian or adult relative not in INS detention, the INS may refuse to release the alien minor if it determines "that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court." In addition, release either to a person designated by the parent or guardian under section 242.24(b)(3), or to an adult other than a parent, legal guardian or adult relative under section 242.24(4), is contingent upon the receiving person's execution of an agreement "to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge." 8 C.F.R. § 242.24(b)(3) (1989). These features establish a rational relationship to the goal of ensuring future appearance.

The regulation serves other purposes as well, in particular the goal of ensuring the alien minor's well-being by favoring release to certain relatives or legally responsible parties, and the related goal of limiting the INS's legal liability by not releasing alien juveniles to someone other than an enumerated party. We view these other purposes as rationally related to effecting the purposes of the statute. In the supplementary information section of the final regulation, the INS explained that:

> On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released. This rule strikes a balance by providing a list of appropriate custodians while maintaining the discretion of the District Director or the Chief Patrol Agent to release a juvenile to any adult other than those listed individuals in unusual or compelling circumstances.

53 Fed.Reg. 17,449. This explanation of the regulation offers a legitimate and reasoned justification for its provisions. The presence of these other purposes does not render the regulation beyond the Attorney General's rulemaking authority.[2]

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[2] The dissent accuses the majority of "go[ing] to great lengths to deny liberty to children whose only possible offense is their alienage," *infra* at 1014, and later implies that the majority is "so unfeeling as to be unconcerned with the tragic effects on children." *Infra* at 1025. With all due respect to the dissenter, we cannot agree that the court's decision whether to require the release of children illegally in the country to unrelated adults is one that should be resolved by attempted characterizing or mischaracterizing the judges' personal feelings. We suggest that an objective analysis of the INS's rule demonstrates it to be a reasonable compromise reached by an agency with limited resources. The dissent assumes, without record support, that release of the children to *unrelated* adults would be far preferable to detainment by the INS. However, the INS thinks otherwise and, unlike the three members of this panel, it had the benefit of notice and comment rulemaking.

As the INS has made clear, it does not possess the resources to undertake a home study of unrelated adults who seek custody of the children. *See supra* at 1002. Thus, if we were to adopt the dissent's approach and order the INS to release the children to unrelated adults, there would be no way to ensure that the children would not be released to child abusers, sexual deviants, or adults that would subject the children to severe neglect. Consequently, the dissent is incorrect in assuming that release of the children to unrelated adults would necessarily benefit the children more than continued detention. Indeed, the risks involved in releasing the children to unknown adults may be far greater than the risks of continued detention. In any event, even if the INS's policy may not be the best possible policy, we are bound to uphold it if it has a rational basis. All we conclude is that it has.

III

Having concluded that the INS did not exceed its statutory authority in promulgating the detention regulation, we turn now to Flores's constitutional challenges, which consist of a substantive and a procedural due process claim.

A.

We first consider Flores's substantive due process claim. The INS argues that the district court erred in holding that the INS's regulation violates substantive due process.

The due process clause of the fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." The fifth amendment's due process clause applies to aliens within the jurisdiction of the United States, even if their "presence in this country is unlawful." *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1975) (*Diaz*); *see also Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896). Thus, the fifth amendment generally applies to the plaintiff class.

Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172 [72 S.Ct. 205, 209, 96 L.Ed. 183] (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-26 [58 S.Ct. 149, 152, 82 L.Ed. 288] (1937)." *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Our analysis begins with determining whether the protection of the due process clause's substantive component, as distinguished from its procedural component, extends to deportable aliens.

Flores's constitutional claims arise in the unique context of our immigration laws. The power over immigration is

political in nature and therefore vested in the political branches. *Diaz*, 426 U.S. at 81-82, 96 S.Ct. at 1891-92; *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 1022, 37 L.Ed. 905 (1893) (*Fong Yue Ting*); *Jean*, 727 F.2d at 964-65. The Constitution specifically authorizes Congress to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. But the statutory and regulatory mandates involved in this case did not emanate from this constitutional grant of authority. As the Eleventh Circuit in *Jean* aptly observed, "[i]t is worth emphasizing that while the Court could have implied the power to regulate immigration from constitutional grants of legislative powers such as the right to declare war, to approve treaties, to regulate foreign commerce, to establish a uniform rule of naturalization, and to enact all necessary and proper laws, the Court instead declared that 'the control of immigration [is] an implied power arising out of national sovereignty and existing without regard to any constitutional grant.' " *Jean*, 727 F.2d at 964; *quoting* 1 C. Gordon & H. Rosenfield, *Immigration Law & Procedure* § 2.2a (rev. 1982); *see also Chae Chan Ping v. United States [The Chinese Exclusion Case]*, 130 U.S. 581, 603-06, 9 S.Ct. 623, 629-30, 32 L.Ed. 1068 (1889); *Fong Yue Ting*, 149 U.S. at 711, 13 S.Ct. at 1021 (characterizing the "right to exclude or to expel all aliens" as "an inherent and inalienable right of every sovereign and independent nation"); *Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir.1984).

Although the executive and legislative branches in theory possess concurrent authority over immigration, "[i]n practice . . . the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." *Jean*, 727 F.2d at 965;

see also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950); *Fong Yue Ting,* 149 U.S. at 713, 13 S.Ct. at 1022. The Supreme Court has long recognized Congress's paramount power to control matters of immigration. *Fiallo v. Bell,* 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (*Fiallo*); *Galvan v. Press,* 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (*Galvan*); *Carlson,* 342 U.S. at 534, 72 S.Ct. at 531; *Harisiades v. Shaughnessy,* 342 U.S. 580, 589-90, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952); *Fong Yue Ting,* 149 U.S. at 713, 13 S.Ct. at 1022; *The Chinese Exclusion Case,* 130 U.S. at 609, 9 S.Ct. at 631. Congressional power in this area is plenary; the Court has repeatedly stressed that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo,* 430 U.S. at 792, 97 S.Ct. at 1478, *quoting Oceanic Navigation Co. v. Stranahan,* 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909). In exercising its broad power over immigration and naturalization, " 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id.*, 430 U.S. at 792, 97 S.Ct. at 1478, *quoting Diaz,* 426 U.S. at 80, 96 S.Ct. at 1891. Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject " 'only to narrow judicial review.' " *Id., quoting Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21, 96 S.Ct. 1895, 1904-05 n.21, 48 L.Ed.2d 495 (1976) (*Hampton*); *Diaz,* 426 U.S. at 81-82, 96 S.Ct. at 1892; *Kleindienst v. Mandel,* 408 U.S. 753, 765-67, 92 S.Ct. 2576, 2582-84, 33 L.Ed.2d 683 (1972) (*Mandel*); *Galvan,* 347 U.S. at 530-32, 74 S.Ct. at 742-43.

The plenary power of Congress and the narrowness of judicial review in the immigration context is reflected in the Supreme Court's teaching that any substantive due process rights aliens might have are extremely limited.

Indeed, the Court's first two important cases in this area suggested that deportable aliens had *no* substantive due process rights. In *Harisiades,* the Court upheld the deportation, under the Alien Registration Act of 1940, of legally resident aliens who had been members of the Communist Party before the 1940 Act's enactment. The Court rejected the aliens' argument that Congress's power to deport "is so unreasonably and harshly exercised by this enactment that it should be held unconstitutional [under the Due Process Clause]." 342 U.S. at 588, 72 S.Ct. at 516. Though acknowledging that the Act under review "stands out as an extreme application of the expulsion power," *id.*, the Court concluded that "in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to *deny or qualify* the Government's power of deportation." *Id.* at 591, 72 S.Ct. at 520 (emphasis added). Earlier in its discussion of the substantive due process claim, however, the Court observed that "[i]t is not necessary and probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution." *Id.* at 590, 72 S.Ct. at 519; *see also id.* at 588-89, 72 S.Ct. at 518-19 ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be *largely* immune from judicial inquiry or interference.") (footnote omitted) (emphasis added). Justice Frankfurter's separate concurrence was free of such ambiguity regarding the constitutional limits of Congress's power: "the underlying policies of what classes of aliens shall be allowed to enter and what classes shall be allowed to stay, are for Congress exclusively to determine even though such determination

may be deemed to offend American traditions. . . ." *Id.* at 597, 72 S.Ct. at 523 (Frankfurter, J., concurring).

Two years later the Court decided *Galvan,* which rejected a similar challenge to the Internal Security Act of 1950. Like the 1940 Act, the Internal Security Act authorized the deportation of legally resident aliens on the grounds that they had once been members of the Communist Party. Galvan argued that the 1950 Act violated substantive due process because it allowed the government to deport him without proving that (1) while a member of the Communist Party, he knew that it advocated violence, or (2) that the Communist Party did in fact advocate violence while he was a member. Viewing *Harisiades* as controlling, the Court, this time with Justice Frankfurter writing for the majority, rejected both arguments. As for Congress's decision to dispense with the requirement of proving, in individual cases, that the Communist Party did advocate violent overthrow of the government, the Court stated that it "cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress." *Id.* at 529, 72 S.Ct. at 528. This statement implies that some statute might fail to pass muster under the due process clause. The Court went on, however, to address Galvan's argument that the statute was unconstitutional because it did not require individualized proof that, while a member, he was aware of the Communist Party's advocacy of violence:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause *qualifies* the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the *enforcement* of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.*

347 U.S. at 530-31, 74 S.Ct. at 743 (citations omitted). The quoted passage suggest that the due process clause places no substantive limitation on congressional power in this area, in spite of some language in *Galvan* and *Harisiades* which could be interpreted to mean that the substantive component of the due process clause might pose some undefined check upon Congress's deportation power.

Both *Galvan* and *Harisiades* concerned substantive due process challenges to the terms or classifications embodied in congressional *statutes.* Several subsequent cases have confirmed that there appears to be little or no substantive due process review available for such congressional choices. *See, e.g. Buchowiecki-Kortkiewicz v. United States INS,* 455 F.2d 972, 972 (9th Cir.), *cert. denied,* 409 U.S. 858, 93 S.Ct. 141, 34 L.Ed.2d 103 (1972); *Matter of Longstaff,* 716 F.2d 1439, 1442-43 (5th Cir. 1983) (dicta as to immigration; case dealt with naturalization), *cert. denied,* 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984); *Anetekhai v. INS,* 876 F.2d 1218, 1222 (5th Cir.1989) (*Anetekhai*). Moreover, courts have repeatedly held that there is no substantive due process right not to be deported. *See, e.g., Doherty v. Meese,* 808 F.2d 938, 944 (2d Cir.1986); *Linnas v. INS,* 790 F.2d 1024, 1031 (2d

Cir.), *cert. denied,* 479 U.S. 995, 107 S.Ct. 600, 93 L.Ed.2d 600 (1986); *Bassett v. United States INS,* 581 F.2d 1385, 1386 (10th Cir.1978). In our circuit, we have summarily rejected such challenges to deportation orders numerous times. *See, e.g., Tsimbidy-Rochu v. INS,* 414 F.2d 797, 798 (9th Cir.1969) (per curiam); *Rodriguez-Romero v. INS,* 434 F.2d 1022, 1024 (9th Cir.1970) (per curiam), *cert. denied,* 401 U.S. 976, 91 S.Ct. 1199, 28 L.Ed.2d 326 (1971); *MacKay v. Turner,* 283 F.2d 728, 728 (9th Cir.1960) (per curiam).

In three subsequent cases dealing with both equal protection and substantive due process challenges under the fifth amendment, the Supreme Court both reaffirmed and clarified the principles of *Galvan* and *Harisiades. Fiallo,* 430 U.S. at 792-93 & n. 4, 97 S.Ct. at 1478 & n. 4; *Hampton,* 426 U.S. at 99-103, 96 S.Ct. at 1903-05; *Mandel,* 408 U.S. at 766-67, 769-70, 92 S.Ct. at 2583-84, 2585. We read *Hampton, Fiallo* and *Mandel* as indicating that the substantive component of the due process clause does operate as some limited constraint on congressional power, though the scope of judicial review on this basis is extremely narrow. *See Fiallo,* 430 U.S. at 793 n. 5, 795 n. 6, 97 S.Ct. at 1478 n. 5, 1479 n. 6; *Hampton,* 426 U.S. at 101, 96 S.Ct. at 1904; *Mandel,* 408 U.S. at 769-70, 92 S.Ct. at 2585 (excludable alien).

Having determined that the substantive component of the fifth amendment's due process clause has some application, in a limited way, to the INS's detention regulation, we next consider the level of scrutiny which is applicable to the regulation. The parties assume that the usual framework of analysis for substantive due process applies. This analytical framework requires a threshold choice between two available levels of scrutiny. When the government "impairs the exercise of a fundamental right," we apply a strict scrutiny standard, which requires the

government to "prove to the Court that the law is necessary to promote a compelling or overriding interest." *Christy v. Hodel,* 857 F.2d 1324, 1329 (9th Cir.1988) (*Christy*) (citations and internal quotations omitted), *cert. denied,* 490 U.S. 1114, 109 S.Ct. 3176, 104 L.Ed.2d 1038 (1989). However, if there is no infringement of a fundamental right, we apply a rational relation test, according to which "the law need only rationally relate to any legitimate end of government." *Id.* (citations and internal quotations omitted). The Supreme Court recently has advised against expanding the list of fundamental rights which have attenuated roots in the language of the Constitution. *Bowers v. Hardwick,* 478 U.S. 186, 194-95, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

Having assumed that the traditional substantive due process framework applies, the parties go on to offer different definitions of the right at stake. Flores claims abridgement of a fundamental right to be free from physical restraint—a right to physical liberty. The INS disagrees, contending that the right claimed is a right of minors in deportation proceedings to be released to unrelated adults. While Flores argues that the right to be free from physical restraint is a fundamental right, the INS contends that the right to be released to an unrelated adult is not fundamental.

We agree with the INS that the right at stake is the right to be released to an unrelated adult. In a substantive due process analysis, the right at stake must be defined narrowly. *See Christy,* 857 F.2d at 1327-30 (in substantive due process challenge to Endangered Species Act, rejecting plaintiff's definition of asserted right as right "to possess and protect property," and defining right at stake

narrowly as "right to kill federally protected wildlife in defense of property"); *see also Almario v. Attorney General,* 872 F.2d 147, 151 (6th Cir.1989) (*Almario*) (in rejecting argument that Immigration Marriage Fraud Act violates due process by unreasonably burdening "fundamental right to marry," stating that "the Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in this country"). The INS's regulation does not bar release of all alien juveniles. It bars release of alien juveniles who are likely to abscond or who, though not likely to abscond, do not have an identifiable parent, legal guardian or adult relative who can accept custody or designate an appropriate custodian. Moreover, Flores has cited no case to support the proposition that the Constitution ensures a fundamental right of alien juveniles in deportation proceedings to be released to unrelated adults. Given the Constitution's assignment of the plenary political power over deportation to the legislative and executive branches, it is clear that no such right exists. As the Supreme Court stated in *Diaz,* "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond [in the immigration area] to changing world conditions should be adopted only with the greatest caution." 426 U.S. at 81, 96 S.Ct. at 1892 (footnote omitted). In light of the Court's admonition in *Hardwick,* we hold that there is no such "fundamental" right in this case.[3]

[3] The dissent disagrees with the narrow way we characterize the right at stake in this case. The dissent suggests that our analysis in determining the right at stake conflicts with the approach used by the Supreme Court in *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), *New York Times v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), and *Wisconsin v. Yoder,*

406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). *Infra* at 1343. Yet in all three of those cases, the right at stake was already rooted in the text of the Constitution—namely, in the first amendment. We do not claim that textually rooted rights should be characterized more narrowly than the text suggests; rather, we simply hold that in dealing with *unenumerated* substantive due process rights, where there exists no textual guidance, it is proper to construe rights narrowly.

The dissent argues that *Hardwick* has no applicability to this case. *Infra* at 1019-1020. We disagree. *Hardwick* clearly demonstrates that, in the area of substantive due process, the list of "fundamental rights" is to be construed narrowly. This is plainly evidenced by a comparison of the majority and dissenting opinions in *Hardwick*. The dissent's position—that the right at stake should be defined at the highest rather than the lowest level of generality—is the same position as that taken by Justice Blackmun in his dissent in *Hardwick*. In the first paragraph of that dissent, Justice Blackmun takes issue with the majority's characterization of the right at stake as "a fundamental right to engage in homosexual sodomy." 478 U.S. at 199, 106 S.Ct. at 2848 (internal quotations omitted). Instead, he would characterize the right at a much higher level of generality: " 'the right to be let alone.' " *Id., quoting, Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). The majority in *Hardwick* properly rejected this broad characterization of the right in favor of the narrower formulation. The majority opinion in *Hardwick* thus provides solid support for our decision to characterize the substantive due process right narrowly.

The dissent also contends that the right to "liberty" or "physical liberty" is enumerated in the text of the Constitution and must therefore be considered a fundamental right. We find no support for this position. While it is true that the fifth and fourteenth amendment due process clauses mention the word "liberty," this does not mean that the "right to liberty" is a free-floating fundamental substantive due process right. Rather, as Justice Scalia has recently reminded us, "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter.* It protects them against deprivations of liberty 'without due process of law.' " *Cruzan v. Director, Missouri Department of Health,* __ U.S. __, __, 110 S.Ct. 2841, 2850, 111 L.Ed.2d 224 (1990) (Scalia, J., concurring). To hold otherwise

would mean, among other things, that courts would be required to review the sentence of every prisoner incarcerated in the United States under strict scrutiny so as to ensure that their fundamental substantive due process "right to liberty" was not being infringed.

The dissent concludes that the children possess a fundamental substantive due process right to "freedom from physical restraint." *Infra* at 1019. The dissent claims that while there may be disagreement over the term "liberty" in the Constitution, there is "no dispute" that "its core reference is to freedom from physical restraint, and that the interest is fundamental." *Id.* While this may be true in the procedural due process context, it is not true in the substantive due process context. No court has ever recognized a fundamental *substantive* due process right to physical liberty. Not surprisingly, therefore, the dissent cites no compelling authority in support of this sweeping assertion. The dissent relies primarily upon *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987), to support this argument. Yet a few lines after the passage quoted by the dissent, the Supreme Court stated that "we *cannot* categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* (emphasis added), *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). The Court in *Salerno* thus unequivocally rejects the idea advanced by the dissent that there exists a fundamental right to physical liberty. Certainly, if, as the Court holds in *Salerno*, pretrial detention does not implicate the "fundamental right" to physical liberty urged by the dissent, such a fundamental right cannot be said to exist.

The dissent also cites *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989), in support of its assertion. *Infra* at 1020. In *DeShaney*, however, all the Court held is that the state's act of physically restraining an individual "trigger[s]" the protections of substantive due process. *Id.* The Court did not hold that individuals restrained by the state possessed a fundamental right to physical liberty, but rather that, once they were restrained, substantive due process required that they should be provided with "basic human needs." *Id.* 109 S.Ct. at 1005.

This conclusion is consistent with the Supreme Court's holdings regarding the constitutional rights of children. Recognizing that children possess "fundamental rights which the State must respect," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969) (free speech rights); *see also Bellotti v. Baird*, 443 U.S. 622, 633, 99 S.Ct. 3035, 3043, 61 L.Ed.2d 797 (1979) (*Bellotti*) (plurality) ("A child merely on account of his minority, is not beyond the protection of the Constitution."), is "but the beginning of the analysis." *Bellotti*, 443 U.S. at 633, 99 S.Ct. at 3043. The Supreme Court has often stated that constitutional rights of children are not coextensive with those of adults. In *Schall v. Martin*, 467 U.S. 253, 263-66, 104 S.Ct. 2403, 2409-11, 81 L.Ed.2d 207 (1984) (*Schall*), the Court, acknowledging that the state may restrict a child's liberty interest in order to secure that child's welfare, upheld the constitutionality of a New York statute authorizing the pretrial detention of juveniles under certain narrow circumstances. The Court reasoned:

> The juvenile's . . . interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children,

Finally, the dissent cites for support *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, 1413-14, 51 L.Ed.2d 711 (1977). *Infra* at 1020. Yet since *Ingraham* was a *procedural* due process case, it obviously fails to support the assertion that there exists a fundamental, *substantive* due process right to freedom from physical restraint.

In short, the dissent advances no authority for the proposition that the right to be free from physical restraint is recognized as an enumerated, or even unenumerated, substantive due process right. In the absence of such authority, we cannot accept the dissent's assertion.

> by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Id. at 265, 104 S.Ct. at 2410 (citations omitted), *quoting Santosky v. Kramer,* 455 U.S. 745, 766, 102 S.Ct. 1388, 1401, 71 L.Ed.2d 599 (1982).

In *Bellotti,* a plurality of the Supreme Court articulated three reasons "justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634, 99 S.Ct. at 3043. While only three other Justices joined Justice Powell's plurality opinion in *Bellotti,* neither the four concurring Justices nor the lone dissenter disputed Justice Powell's summary of rationales reflected in the case law for affording children lesser constitutional rights than adults. Because the three *Bellotti* factors represent the Court's only reasoned discussion to date of the possible bases for distinguishing minors' constitutional rights from adults, they are frequently cited as controlling in cases that require such a distinction. *See, e.g., Johnson v. City of Opelousas,* 658 F.2d 1065, 1073 (5th Cir.1981); *McCollester v. City of Keene,* 586 F.Supp. 1381, 1385-86 (D.N.H.1984).

In our view, all of the *Bellotti* factors are implicated in this case, but especially the first. The INS's regulation governing the detention of minors is based at least in part upon a concern for the "peculiar vulnerability" of alien

minors. *See Bellotti,* 443 U.S. at 635, 99 S.Ct. at 3043 ("Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability. . . ."). We view the INS's regulation as an exercise of governmental power which takes into account the peculiar vulnerability of alien children. The exercise of such power does not encroach upon a fundamental right.

Since there is no fundamental right implicated in this case, we must apply minimal scrutiny to the INS regulation, and consider whether the regulation was rationally related to any legitimate end of government. But, once more, we must fashion our review based upon the type of case before us. Even where a fundamental right is arguably at stake, there is a strong presumption for rational basis review in the context of immigration cases. *See Adams v. Howerton,* 673 F.2d 1036, 1041 (9th Cir.) (declining to consider whether homosexual couple had fundamental "right to marry" which was infringed by immigration statute, and holding that "[e]ven if it were [a fundamental right], we would not apply a strict scrutiny standard of review to the statute" given Congress's plenary power over immigration), *cert. denied,* 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982); *see also Anetekhai,* 876 F.2d at 1218 (Marriage Fraud Amendments to the Immigration and Nationality Act); *Almario,* 872 F.2d 147 (same); *Ademi v. Moyer,* 1989 WL 56904, 1989 U.S.Dist. LEXIS 5953 (N.D.Ill. May 22, 1989) (same); *Escobar v. Immigration & Naturalization Service,* 700 F.Supp. 609 (D.D.C.1988) (same); *Smith v. Immigration & Naturalization Service,* 684 F.Supp. 1113 (D.Mass.1988) (same).

Flores argues that the INS's regulation is not rationally related to a legitimate end of government. The INS cites four interests served by the regulation: (1) ensuring the minors' appearance at future deportation proceedings; (2) fostering the welfare or safety of the detained minors; (3) insulating the INS from liability for harm befalling released minors; and (4) administrative economy, since the INS does not have the resources to conduct the home studies necessary to determine whether adults outside the regulation would be responsible. These are all legitimate ends for the INS to pursue in this context, and the regulation is rationally related to these goals.

Flores contends, however, that the INS presented no evidence that the regulation furthered any of the asserted interests. Flores also argues that the actual purpose behind the regulation is to capture the illegal alien parents of detained minors, though Flores has pointed to nothing in the record which supports this contention. In addition, Flores argues that the INS's cost efficiency interest is undermined by the cost of detention, which can reach $100 per day per child. All three of these contentions, however, reflects a misunderstanding of the minimum scrutiny test. Under that test, a law "will be upheld if the court can hypothesize any possible basis on which the legislature might have acted." *Christy*, 857 F.2d at 1329; *see also id.* at 1328 n.2; *United States v. Barajas-Guillen*, 632 F.2d 749, 754 (9th Cir.1980) (*Barajas-Guillen*). "Since the court itself may postulate a basis for the legislation, satisfaction of the rationality test should be deemed a legal, rather than a factual, issue." *Christy*, 857 F.2d at 1328 n. 2; *see also Barajas-Guillen*, 632 F.2d at 753-54. Moreover, once the interests or purposes served are delineated, Flores bears the burden of demonstrating that there is no rational connection between these purposes and the regulation. *Harrah Independent School District v. Martin*, 440 U.S. 194,

198, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248 (1979) (per curiam). Since Flores has failed to carry this burden, we conclude that the regulation is indeed rationally related to the interests noted above.

Bearing in mind the very limited nature of our substantive due process review in this field of law, it is clear that Flores's substantive due process challenge to the regulation must be rejected. To the extent the district court based its ruling on this prong of due process law, it must be reversed.

B.

The INS next challenges the district court's summary judgment on Flores's *procedural* due process claim. Aliens in deportation proceedings enjoy certain procedural due process rights under the fifth amendment. *Baires v. INS*, 856 F.2d 89, 90 (9th Cir.1988). In order to understand Flores's procedural due process claim, we must briefly review the INS's existing procedures both for arresting and for setting release and bond conditions of aliens who are believed to be deportable.

A deportation proceeding is commenced when the INS files with the Office of the Immigration Judge, an Order to Show Cause why the respondent should not be deported. 8 C.F.R. § 242.1(a) (1988). Under 8 U.S.C. § 1252(a)(1), the Attorney General is empowered to issue warrants for arrest and take into custody aliens suspected of being deportable. The regulations authorize the issuance of an arrest warrant once the Order to Show Cause is issued. *See* 8 C.F.R. § 242.2(b)(1) (1988).

By statute, an immigration officer is also empowered to arrest *without a warrant:*

> any alien in the United States, if he has reason to believe that the alien so arrested is in the United States

> in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States. . . .

8 U.S.C. § 1357(a)(2). For aliens arrested without a warrant, the applicable regulations provide that the alien must be examined as provided in section 1357(a)(2) "by an officer other than the arresting officer" (examining officer) unless "no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay," in which case the arresting officer may examine the alien. 8 C.F.R. § 287.3 (1988). The examining officer is an INS officer, not an immigration judge (IJ). *See 8 C.F.R.* § 1.1(l) (1988). If the examining officer "is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws," then the officer will take steps to initiate deportation proceedings. 8 C.F.R. § 287.3 (1988). The regulations do not define "prima facie evidence." Once the examining officer has determined that prima facie evidence exists, the alien is advised of various rights and informed that a decision on custody will be made within 24 hours. *Id.* The alien is also informed that his case "shall be presented promptly, and in any event within 24 hours, for a determination as to whether there is prima facie evidence [of illegal presence] and for issuance of an order to show cause and warrant of arrest as prescribed in Part 242 of this chapter." *Id.*

The amount of bond and conditions of release are set by INS officials. Under the regulations, a custody or bond decision for aliens arrested without a warrant must be

made within 24 hours after the appearance before the examining officer. 8 C.F.R. § 287.3 (1988). The regulation governing release and bond decisions is 8 C.F.R. § 242.2 (1988). It provides that once release or bond conditions are set, the alien "may apply to any officer authorized by this section" for release or an amelioration of bond conditions. 8 C.F.R. § 242(b) (1988). Alternatively, an alien detained or released on bond may obtain review in a bond redetermination hearing before an IJ. 8 C.F.R. § 242.2(c) (1988). Such a hearing is available only "upon application by" the alien. *Id.* The regulations do not require the IJ to decide motions relating to bond conditions within any specific time. *Id.* Adverse decisions in redetermination hearings may be appealed to the Board of Immigration Appeals (BIA) by either the alien or the INS, though there is no time limit within which the BIA must render its decision. *Id.*

With this framework in mind, we turn to the parties' arguments. Apparently relying on both *Gerstein v. Pugh* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), Flores argued in the district court that the INS was constitutionally required to provide "prompt, mandatory, neutral and detached" review to each class member following arrest of (1) whether probable cause to arrest existed, (2) whether imposition of the release or bond condition was necessary to ensure future appearance, and (3) whether any suitable adult was available to whom the juvenile could be released. Flores also challenged the INS's alleged failure to provide prompt written notice to released juveniles of the bond conditions which had been imposed.

In granting summary judgment to Flores, the district court, with virtually no explanation of its reasons, ordered the INS to do the following:

1. Defendants . . . shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.

2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.

3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

Paragraph 1 of the order was premised on the district court's determination that the INS's regulation violated substantive due process. In the preceding section, we explained our reasons for reversing that part of the order. The relief granted by paragraph 2 is inextricably linked to the relief granted by paragraph 1. Paragraph 2 requires the INS to provide notice of the bond conditions imposed under its regulation, but apparently only to those who would be *released* pursuant to district court's modification of the regulation.

Paragraph 3 requires an "administrative hearing" which must occur "forthwith." It is not entirely clear whether this administrative hearing is to occur before an IJ ("special examining officer"), or instead may be conducted before a second immigration officer. We assume that the district judge intended the former. The record supports this interpretation. Moreover, the alternative interpretation would deprive the injunction of much practical effect, since at least those aliens who are arrested *without* a warrant already are entitled to have probable cause reviewed by a second immigration officer "without unnecessary delay." *See* 8 U.S.C. § 1357(a)(2). The purpose of the hearing ordered by the district court is to determine (1) probable cause for the juvenile's arrest and (2) the need for any restrictions placed upon the juvenile's release. Finally, paragraph 3 apparently mandates an administrative hearing in every case. That is, the hearings are automatic, need not be requested, and perhaps cannot be waived. Paragraph 3 appears to be based on *Gerstein*.

In *Gerstein*, the Supreme Court held that the fourth amendment requires review, by a neutral and detached magistrate, of probable cause for arrest prior to any "extended restraint of liberty following arrest." 420 U.S. at 114, 95 S.Ct. at 863. The district court apparently assumed that *Gerstein* applies to civil deportation proceedings. The court may have believed that the INS examining officer was not "neutral and detached" under *Gerstein*. The rationale would seem to be that because both the INS officers who arrest the aliens and those who make a determination as to whether there is *prima facie* evidence that will allow the INS to detain the alien are law enforcement officials, they are incapable of being neutral or impartial. The INS responds that (1) the role of INS officers is equivalent to a committing magistrate's role, and (2) the requirement of prima facie evidence is more stringent than probable cause.

We need not resolve this dispute since we conclude that *Gerstein* does not apply to deportation proceedings. The precise issue in *Gerstein* was "whether a person arrested and held for *trial* under a prosecutor's information is con-

stitutionally entitled to a judicial determination of probable cause for *pretrial* restraint of liberty." 420 U.S. at 105, 95 S.Ct. at 858 (emphasis added). The Court in *Gerstein* itself stressed that its holding was not readily transferable to civil proceedings. *See id.* at 125 n.27, 95 S.Ct. at 869 n. 27 ("The Fourth Amendment was tailored explicitly for the criminal justice system. . . . Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures . . . presented in . . . [Justice Stewart's] concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.") (emphasis in original).

It is true that in *Schall* the Court cited *Gerstein* numerous times in upholding pretrial detention of juveniles in civil proceedings under a New York statute. *Schall,* 467 U.S. at 264, 274-77 & nn. 27-28, 104 S.Ct. at 2515-16 & nn. 27-28. The Court never declared, however, that *Gerstein's* standards directly applied to civil juvenile proceedings. Instead, the Court's discussion recognized that *Gerstein* had arisen in a different context. *See id.* 467 U.S. at 274-75, 104 S.Ct. at 2415 (recognizing that *Gerstein's* holding applied to *adults*); *see also id.* at 275 ("*Gerstein* arose under the Fourth Amendment, but the same concern with 'flexibility' and 'informality,' while yet ensuring adequate predetention procedures, is present in this case."). Thus, in *Schall,* the Court merely held that the New York statute "provide[d] far more predetention protection for juveniles that we found to be constitutionally required for a probable-cause determination for adults in *Gerstein.*" *Id.* 467 U.S. at 275, 104 S.Ct. at 2415. As we read *Schall,* it did not hold that *Gerstein* applied to civil proceedings.

The Supreme Court's decision in *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (*Salerno*), is also inapposite. In *Salerno,* an adult criminal detainee challenged on constitutional grounds a provision of the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, permitting dangerous felons to be detained before trial without bail. *See* 18 U.S.C. § 3142. The Court's procedural due process analysis in *Salerno* was geared toward the rights of adult citizens facing detention in the criminal context. *See Salerno,* 481 U.S. at 747-52, 107 S.Ct. at 2101-04. The situation before us in this case involves the rights of juvenile aliens facing detention in the civil context. For reasons discussed above, the quantum and type of due process protection afforded alien minors in civil deportation proceedings is different from that afforded adult criminals. We therefore do not need to follow the procedural due process analysis used by the Court in *Salerno* in order to decide this case.

Nor is it unusual that deportation proceedings, which by nature are not only "purely civil" but also a unique *kind* of civil proceeding, would feature fewer procedural due process protections than a criminal trial. *See INS v. Lopez-Mendoza,* 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (exclusionary rule does not apply in deportation hearings). Other examples of criminal trial protections that do not apply in deportation proceedings include the quantum of proof, the need of *Miranda* warnings before a voluntary statement is given by the respondent, the *ex post facto* clause; and the inadmissibility of involuntary confessions. *Id.* 468 U.S. at 1039, 104 S.Ct. at 3483. Because deportation proceedings are civil, "the full panoply of due process rights [are] not applicable. . . ." *Jean,* 727 F.2d at 974.

We are unpersuaded by several cases that have either assumed, without analysis, that *Gerstein* applies to INS

probable cause determinations, or have drawn analogies between INS officers on the one hand and committing magistrates in a criminal context on the other. For example, in *Min-Shey Hung v. United States,* 617 F.2d 201, 202 (10th Cir.1980), the court examined the identical procedure that is at issue here, and found it sufficient to meet constitutional standards. The court likened the District Director's decision to a magistrate's. The decision

> is basically the same as a criminal proceeding before a magistrate on probable cause. Probable cause was thus also determined by the District Director. This, in our view, was sufficient to meet the constitutional standards and to commence the deportation proceedings. Probable cause for the arrest was so determined.

Id. At the same time, however, the court, in citing *Gerstein,* acknowledged that it had focused on "Florida criminal procedures," and therefore articulated a "standard applicable to a state." *Id.; see also Arias v. Rogers,* 676 F.2d 1139, 1142 (7th Cir.1982) (erroneously concluding that examining officer mentioned in 8 U.S.C. § 1357(a)(2) was IJ rather than INS official, and analogizing immigration judge to "committing magistrate in criminal proceeding"). We conclude that *Gerstein's* "neutral and detached" magistrate requirement is inapplicable to deportation proceedings.

Our holding is in keeping with the Supreme Court's forceful dicta in *Abel v. United States,* 362 U.S. 217, 230-34, 80 S.Ct. 683, 692-95, 4 L.Ed.2d 668 (1960). In *Abel,* though professing not to reach the issue of whether an INS arrest warrant was invalid because it failed to comply with the fourth amendment's requirements for warrants, the Court nonetheless devoted five pages to rejecting petitioner's claim. *See, e.g., id.* at 233, 80 S.Ct. at 694 ("[T]here remains overwhelming historical legislative

recognition of the propriety of administrative arrest for deportable aliens such as petitioner."); *see also Jean,* 727 F.2d at 974 n. 24; *Spinella v. Esperdy,* 188 F.Supp. 535, 540-41 (S.D.N.Y. 1960).

The district court based its ruling largely on *Gerstein.* It did not explicitly test the INS procedures incident to detention decisions by balancing the three factors outlined in *Mathews. Mathews* instructs that a court should weigh: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the interest through the procedures used, and the probable value of additional or substitute safeguards; and (3) the governmental interest, which includes the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail. 424 U.S. at 334-35, 96 S.Ct. at 902. The *Mathews* test is the general test for procedural due process and is applicable to INS procedures such as those involved in this case. *See Landon v. Plasencia,* 459 U.S. 21, 36-37, 103 S.Ct. 321, 331-32, 74 L.Ed.2d 21 (1982).

We will not undertake the *Mathews* balancing in the first instance. The parties have not briefed this issue in detail. *See id.* 459 U.S. at 36-37 & n. 9, 103 S.Ct. at 331 & n. 9 (declining to consider whether exclusion hearing afforded permanent resident alien returning from 2-day trip abroad met *Mathews* standard since parties devoted attention to other issues on appeal and "[p]recisely what procedures are due . . . has not been adequately developed by the briefs or argument"). Moreover, the district court should have the first opportunity to reconsider in light of our invalidation of paragraph 1 of the order. We therefore remand this issue to the district court, where the parties will have a fuller opportunity to explore the issue.

REVERSED AND REMANDED.

FLETCHER, Circuit Judge, dissenting:

I respectfully dissent. As Chief Justice Rehnquist observed, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno,* 481 U.S. 739, 755, 107 S.Ct. 2095, 2105, 95 L.Ed.2d 697 (1987). The majority goes to great lengths to deny liberty to children whose only possible offense is their alienage.

The facts of this case are among the most disturbing I have confronted in my years on the court. Children are being held in detention by the INS for as long as two years in highly inappropriate conditions out of a professed concern for their welfare. When the case first came before the district court, the only requirement for institutionalizing a child was a determination by an INS agent—not a judge—that there was prima facie evidence of the child's deportability. Upon such a slender showing, children were put into "detention centers" for indeterminate periods of time, deprived of education, recreation, and visitation, commingled with adults of both sexes and subjected to strip searches with no showing of cause. In the INS's Western Region, a child could escape such confinement only if a parent or legal guardian, or "in unusual and extraordinary cases" a responsible adult, came forward to seek release. The rationale for this regulation was to assure the "minor's welfare and safety" and to protect the agency from legal liability.

Only after suit was brought against it did the INS agree to modify the conditions of confinement and the treatment of the children during detention. The district court approved a partial settlement whereby the INS agreed to provide education, reasonable visitation rights, and recreation as well as to cease commingling detained minors with unrelated adult prisoners. Subsequently, without

agreement of the INS, the court ordered the INS to cease strip searching the children unless it had reasonable suspicion to believe they were concealing weapons or contraband. The INS has not appealed that order.

In light of the INS's announced intention to promulgate new rules governing minors' pre-hearing release, the district court agreed to postpone ordering the agency in the Western Region to release children awaiting their deportation hearing to responsible adults (although that was the practice followed by the INS in other regions of the country and was the nationwide policy regarding children held for exclusion hearings). The INS's final regulations, however, allowed release to responsible adults other than parents, legal guardians, and adult relatives only in "unusual and compelling circumstances" and did nothing to provide for neutral and detached evaluation of the basis for determining the likelihood that the detained minors were deportable.

The district court concluded that the final regulations did not satisfy minimum due process requirements. Judge Kelleher entered an order requiring the INS (1) to release minors otherwise eligible for release to their parents, guardian, custodian, conservator, or other responsible adult party, (2) to advise those released promptly in writing of the conditions of their release, and (3) to hold a prompt administrative hearing to determine probable cause for their arrest and the need for any restrictions to be placed upon their release. This was a simple, sensible, minimally intrusive direction to the agency. I would uphold it rather than search for ways to reverse.

The result the majority reaches is deeply troubling. Equally troubling, however, are the analytic framework and standard of review adopted by the majority; they will reverberate well beyond the issues presented in this particular case.

I

The majority opinion rests its holding on Congress' plenary power over matters of immigration and naturalization and on the broad discretion Congress has delegated to the Attorney General and the INS to carry out its decisions to admit or exclude certain groups of persons. I agree with the majority that the INS has broad authority and discretion.

I also agree with the majority's rejection of the appellees' statutory argument that Congress limited the agency to promulgating regulations that would insure the appearance of minors at their upcoming deportation hearings. This, however, disposes only of appellees' claim that the INS exceeded the scope of its statutory authority.

The INS's discretion also is limited by the Constitution. Despite Congress' broad powers in matters of immigration, the Constitution extends certain protections to all persons within the jurisdiction of the United States. For instance, the protections of the Fifth and Fourteenth Amendments extend to aliens physically present in the United States. *Mathews v. Diaz,* 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1975) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Baires v. INS,* 856 F.2d 89, 90 (9th Cir. 1988). Nor are appellees ineligible for constitutional protection because of their youth. *Schall v. Martin,* 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Despite these clear holdings and despite the

fact that laws that adversely treat aliens or that infringe on a basic constitutional right warrant heightened scrutiny, the majority nevertheless concludes that the INS's regulations are largely beyond judicial review. In arriving at its conclusions, the majority makes two errors in its constitutional analysis.

A

First, the majority misinterprets the scope and overlooks the source of the executive and legislative branches' decretion. After establishing that the subject matter of the challenged regulations (the manner of detention of suspected illegal aliens) is not outside the scope of the INS's statutory authority, a proposition with which I fully agree; the majority proceeds to discuss another subject entirely, Congress' broad authority to determine who should be allowed to enter and remain in the country. The opinion then moves from the discussion of Congress' unfettered power to decide *whom to admit* to the United States to the conclusion that since the due process clause does not constrain congressional power to determine who may enter, this somehow determines the due process rights of individuals present in the United States awaiting deportation proceedings and constrains judicial review of claimed violations of their due process rights and conditions of confinement.

In effect, the majority is moving from the uncontroverted propositions that the political branches have plenary authority over deciding whom to admit into the country and that such political decisions are largely immune from judicial review, to the unsupportable conclusion that how it treats those whom it detains while the deportation process is underway is likewise beyond judicial review. This is an unwarranted leap.

The majority exhaustively reviews the relevant statutes, legislative history, and case law to establish the general proposition that the legislative and executive branches have virtually unbridled authority over matters of immigration and naturalization. While it is true that the political branches have virtually unreviewable authority to decide whom to admit into the United States and whom to exclude, this does not mean they can do just anything to an individual while his status is under review. A decision by the political branches to admit more Nigerians than Irish into the United States may not be vulnerable to an Equal Protection challenge. But a decision to incarcerate all Nigerians awaiting deportation hearings but not Irish would be accorded no such judicial deference. The courts' deference to the "plenary power" of Congress is limited essentially to Congress's decision regarding *who* is excludable; it does not extend to their treatment during the deportation process. The very Supreme Court cases upon which the majority relies makes this clear. *See e.g., Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1976) (upholding law granting preferential immigration status to natural mothers but not natural fathers of children born outside of marriage); *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952) (upholding Alien Registration Act of 1940, which authorized deportation of aliens because of their membership in the Communist Party); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954) (upholding Internal Security Act of 1950 which provided for the deportation of legally resident aliens because they had once been members of the Communist Party even though unaware of the party's advocacy of violent overthrow of the government). The cases the majority cites in which the Supreme Court recognized that "Congress regularly makes rules that would be unacceptable if applied to citizens," likewise refer to legislative

decisions regarding which aliens to exclude from the country. For instance, in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) the Supreme Court affirmed the Attorney General's denial of a visa for a Marxist alien scholar even though such action would violate the First Amendment if applied to a U.S. citizen.

The respective roles of the three branches is readily understandable once one recognizes that congressional and executive authority over immigration stems from the allocation within our scheme of separation of powers and federalism, to the national political branches of all authority over foreign relations and national security. This both limits and justifies congressional and executive authority. The reason for the substantial deference that the judiciary owes to the other two branches in these areas has been recognized time and again by the Supreme Court. In *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1975), the Court observed that the political branches of the federal government are responsible for our relations with foreign powers and cautioned that constitutional law must not unnecessarily inhibit the flexibility of the political branches to respond to changing political and economic global conditions. The *Diaz* Court relied on the reasoning of a 1952 case, *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, in which the Court noted that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 588-89, 72 S.Ct. at 518-19. Similarly, in *Galven* [*sic*], 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1953), the Court deferred to the broad

power of Congress over sovereignty, foreign relations, and national security.

The majority quotes these cases and others to support its view that the judiciary must defer to the INS in all matters: "Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject ' "only to narrow judicial review." ' " (Maj.Op. at 1004). What the majority glosses over, however, is that those cases limit the INS's claim to deference to those areas that affect our country's relations with foreign powers or our national security.[1]

The majority suggests without quite saying it that Congress wished to give and the courts have allowed the INS virtually unreviewable discretion to hold arrested aliens in custody prior to their deportation hearings. The majority quotes extensively from Congressional committee reports of the Hobbs Bill, a defeated precursor to the 1950 Subversive Activities Control Act (of which the present § 1252 is a derivative of a derivative). The majority highlights those sections that express Congressional intent to grant the Attorney General "untrammeled authority" to impose conditions of release (such as requiring aliens to make periodic reports as to their location or to post more bond money) pending final determination of deportability. I question whether this statement, made in the 1950's, regarding discretion to impose conditions on those aliens released on bond is a useful aid to judicial interpretation of the effect of the current immigration act on the INS's discretion to refuse to release aliens under any condition. Even if it were, such legislative history that would infuse a

[1] As one commentator notes, "even the federal government cannot make free use of alienage classifications which do not relate to foreign policy." Rotunda, Nowak, and Young, *Treatise on Constitutional Law: Substance and Procedure*, § 18.12, at 494.

statute with an unconstitutional cast should be read suspiciously and narrowly. *See United States v. Witkovich*, 353 U.S. 194, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957) (rejecting a literal reading of a provision of the Immigration and Nationality Act of 1952 where such a broad interpretation of the discretion granted the Attorney General would generate constitutional doubts as to the validity of the statute).

The majority also relies heavily on *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), in which the Court, in reviewing the bond provisions of the Subversive Activities Control Act, agreed with the government that "Congress' intention [was] to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." *Carlson* cannot be read as the majority suggests as conferring upon the INS unfettered authority over pre-hearing detention of aliens. The purpose of the Subversive Activities Control Act was to deport all alien Communists as a menace to the security of the United States. *Carlson* involved a challenge to the Attorney General's decision to hold aliens who were active Communists without bail pending determination of their deportability. The Attorney General justified the exercise of discretion to deny bail "by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543, 72 S.Ct. at 536. The Supreme Court upheld the pre-hearing detention out of deference to the Attorney General's national security authority: "As all alien Communists are deportable, like Anarchists, because of Congress' understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives

adequate grounds for detention." *Id.* at 541, 72 S.Ct. at 535. *Carlson* merely upheld the INS's detention of those individuals who pose a threat to the community or who are a "menace to the public interest." *Id.* at 541, 72 S.Ct. at 534. Where the Supreme Court subsequently has cited *Carlson*, it has given it a narrow interpretation. *United States v. Salerno*, 481 U.S. 739, 748, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (*Carlson* cited for proposition that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1983) (*Carlson* cited for proposition that the Eighth Amendment does not require bail to be granted in "certain" deportation cases). The majority's reliance on *United States Ex Rel. Barbour v. District Dir. of INS*, 497 F.2d 573 (5th Cir.1974) is likewise misplaced as that case also addressed the INS's authority to detain an alien believed to pose a risk to national security. (The Syrian government had notified U.S. authorities of petitioner's true identity as an officer of the Syrian Army accused of smuggling money.)

Where the INS acts outside this realm—as it does when it determines how the people whom Congress has decided will not be admitted into the United States are to be treated while they await deportation determinations as well as when it purports to act in the interest of alien children—the INS has no special claim to deference beyond that which we accord any other agency. Although protecting the children's welfare may be a statutorily permissible interest, the agency is entitled to no special deference in this area. Recent Supreme Court cases are in accord. Although reaffirming the political branches' virtually unreviewable authority over decisions as to which groups to exclude and whom to deport, the Court has struck down laws that imposed discriminatorily adverse

conditions or treatment of aliens while present in our country. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) the Court found that the Civil Service Commission regulation barring non-citizens from civil service employment unconstitutionally deprived resident aliens of liberty without due process in violation of the Fifth Amendment. The Court explicitly rejected the government's "primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." Similarily, in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, in striking down a state law withholding funds for the education of illegal alien children, the Court analyzed the degree of deference due this state law by contrasting it to the deference accorded federal legislative decisions which is derived from Congress' plenary authority over foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders. The Court noted that the "obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." The regulations at issue in this case present no delicate foreign policy issues. They do not impinge in any way on decisions as to which groups of people to admit or exclude from the country. Nor is there any claim made that these children pose a risk to our national security. The INS regulations at issue command no special deference.

B.

On the contrary, the agency's regulations should be more *closely* reviewed because they deprive a group traditionally subject to discrimination of their physical liberty; a quasi-suspect class is being deprived of a basic constitutional right. Either factor is sufficient to trigger height-

ened judicial scrutiny. Both are present here. The majority nonetheless insists we should apply a deferential standard of review. This second error also is critical. Perhaps less so to the outcome of this case—since the regulations could not pass even a rational relation test—than to the integrity of constitutional analysis.

I disagree profoundly with majority's characterization of the constitutional right at stake. The majority, starting from the premise that in substantive due process analysis, the right at stake must be defined narrowly, then defines the right claimed by appellees as "the right of alien juveniles in deportation proceedings to be released to unrelated adults." (Maj.Op. at 1007). The majority, unable to locate this phrase in the constitution or precedent, then reasons that there is no fundamental constitutional right implicated and that the regulations are subject to only minimal scrutiny. This analysis is, very simply, wrong.[2] The Constitution is not a civil code. Constitutional rights are not characterized at that level of specificity. To define the right as the majority does defines it out of existence. For its approach to constitutional analysis—which would apply in Equal Protection Clause analysis as well—the majority relies on two cases. It cites *Christy v. Hodel*, 857 F.2d 1324 (9th Cir.1988), for the proposition that the right at stake must be defined narrowly for the purposes of substantive due process analysis. What the court said was that strict judicial scrutiny of legislation is reserved for enactments that "impinge upon constitutionally protected rights." (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct.

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[2] Elsewhere, the majority concludes that there is no "substantive due process right not to be deported." This exemplifies the use of a straw person to obfuscate the real issue. This case is not about deportation; it is about pre-hearing detention.

1278, 1300, 36 L.Ed.2d 16 (1973)). *Christy* involved an alleged taking of property by an Interior Department Endangered Species Act regulation that prohibited the killing of grizzly bears. Plaintiffs alleged this deprived them of their constitutional right to defend their sheep. The District Court granted summary judgment for the government. Despite a well developed body of caselaw that guides the analysis of takings claims under the fifth amendment, the court analyzed the case as requiring the court to determine first whether the plaintiffs were alleging a "fundamental right." The plaintiffs urged that, since the Supreme Court had inferred a constitutional right to privacy despite the absence of express language in the constitution, this court should recognize a constitutional right to kill federally protected wildlife in defense of one's property. The court understandably declined to do so.

Christy should be read simply as a refusal to find that the fifth amendment protection of property rights embraces the right to be exempt from laws protecting endangered species. To the extent *Christy* is read as standing for a general proposition that rights must be defined narrowly in substantive due process cases, it is inconsistent with Supreme Court precedent. In *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1957) the Court did not consider whether there is a fundamental right against "forced disclosure of membership lists." Rather it analyzed the impact of state law on the fundamental right to "association." In *New York Times v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), the Supreme Court considered the impact of the government's action, not on the newspaper's right to publish a classified study on the United States policy-making in Viet Nam, but on the newspapers' right of freedom of the press. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, the Court did not examine whether

there is a fundamental right to educate one's children at home once they have completed the eighth grade; it analyzed whether the state compulsory education law violated the right to free exercise of religion.

In the second case cited to support the majority's assertion that rights must be narrowly defined, *Almario v. Attorney General*, 872 F.2d 147 (6th Cir.1989), the sixth circuit rejected plaintiffs' argument that the Immigration Marriage Fraud Act violates due process by unreasonably burdening the fundamental right to marry. The opinion does state that the constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in this country. However, the court merely was restating the holdings of previous cases, which concluded that the deportation of alien spouses did not unconstitutionally interfere with the right to marry, a right which the court recognized was fundamental. Finding that a constitutional right is not *violated* by a particular government action is quite different from denying the existence of the right.

Recent debates over which rights are "fundamental" have occurred in the context of deciding whether *unenumerated* rights – those rights not readily identifiable in the text of the Constitution or its amendments – such as the right to privacy, to association, to vote, or to obtain education, should qualify as fundamental.[3] The analysis the majority has employed to define the right is suitable when the issue facing the court is whether an activity that is at the periphery of an already recognized right should be included in that category. *See e.g., Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780 (does first amendment right to

[3] The Court originally considered which individual rights are considered fundamental when it undertook the task of "selective incorporation" or making applicable to the states certain provisions of the Bill of Rights.

free speech include the right to wear a jacket with obscenities emblazoned on it); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (does right to free speech include right to make campaign expenditures); *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1981) (does liberty interest of institutionalized persons extend to training and habilitation necessary to ensure bodily safety and a minimum of physical restraint). It is obvious that this case requires neither type of analysis.

The majority also relies on *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) to support its characterization of appellees' right. *Hardwick* simply has no applicability to this case. In *Hardwick*, the Court advised against expanding the list of fundamental rights which have attenuated roots in the language or design of the Constitution and the Court refused to acknowledge that engaging in "homosexual sodomy" was included in the right to privacy. Although there may be disagreement over the far reaches of "liberty," there can be no dispute that its source is the text of the Constitution, that its core reference is to freedom from physical restraint, and that the interest is fundamental. This is apparent from all the decisions that have addressed substantive and procedural due process challenges to government's incarcerating or institutionalizing persons.

As the Supreme Court stated in *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987), although the government has a strong interest in protecting the community from allegedly dangerous criminals, it must be balanced against "the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right." *See also, DeShaney v. Winnebago County DSS*, 489 U.S. 189, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989) ("In the substantive due process analysis, it is the State's affirmative

act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . ."); and *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977) (the "liberty interest . . . [has] always . . . been thought to encompass freedom from bodily restraint.")[4]

[4] The majority relies on Justice Scalia's concurring opinion in *Cruzan v. Director, Missouri Department of Health*, __ U.S. __, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) as support for its definition of the constitutional right at issue in this appeal. The majority's reliance on the concurrence is surprising since all but Justice Scalia acknowledged that there are substantive limits on the ability of the state to infringe upon an individual's right to liberty. Additionally, *Cruzan* like *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) is a case that required the Court to further define the outer boundary of a recognized constitutional right, i.e. does the right to liberty encompass the "right to die?" It cannot seriously be argued that the right to liberty does not encompass the right to physical liberty.

Justice Scalia, in contrast to the other eight Justices, resisted finding a substantive due process right implicated and declined to agree that "due process" includes substantive limits. The majority quotes Justice Scalia: "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*." *Cruzan* 110 S.Ct. at 2859. Yet a few lines after the passage quoted by the majority, Justice Scalia explains that he need not resolve whether the due process clause imposes substantive limitations on government action because "no substantive due process claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference." *Id.* 110 S.Ct. at 2859-60. Justice Scalia traces the history of the law regulating suicide and concludes that traditional Anglo-American law accorded it no protection. Even assuming the validity of Justice Scalia's analysis, it provides no support for the majority's position in the present case: an examination of the history of Anglo-American law would uncover a traditional definition of liberty that at the minimum encompassed physical liberty. As Justice Cardozo wrote, "Bills of rights give assurance to the individual of the preservation of

liberty. They do not define the liberty they promise. In the beginnings of constitutional government, the freedom that was uppermost in the minds of men was freedom of the body. . . . There went along with this, or grew from it, a conception of a liberty that was broader than the physical." B.N. Cardozo, "Paradoxes of Legal Science," in *Selected Writings of Benjamin Nathan Cardozo*, 311 (M.E. Hall ed. 1947)

The majority observes that the right to liberty is not a "free-floating fundamental substantive due process right." *Flores*, at 1007 n. 3. I agree. The Constitution does not forbid the detention of either adults or children. But it is axiomatic that the Constitution places a heavy burden upon the state to establish that deprivation of an individual's physical liberty is neccesary. Traditionally this burden must be met by a showing of such things as the fact that the person committed a crime or that he must be committed because he poses a danger to society or to himself—determinations accompanied by strict procedural safeguards which are conspicuously absent here. This constitutional tradition is precisely why the pretrial detention at issue in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, was so controversial. It also explains why, even though the *Salerno* Court may not have used the terminology of strict scrutiny, it exercised careful and searching review of the need for the government's pretrial detention system. (Ironically, one is reminded of *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) where the majority purportedly applied strict scrutiny, while the dissent, applying only a reasonable relation test, found the government's invocation of national security insufficient justification for detaining aliens and citizens of Japanese descent.)

The problem with the majority's opinion is that it assumes that the government may incarcerate an individual unless he can establish the existence of an extraordinary reason why he should remain free. The history of our law teaches us otherwise: the state may not jail someone unless it can present an overriding justification for doing so. Or as Justice Cardozo wrote, "The subject was not to be tortured or imprisoned at the mere pleasure of the ruler." Cardozo at 311.

When the individuals detained have no representation in the political process, we have an added obligation to assure ourselves that the state is not acting improperly. There is a final irony in the majority's reliance on Justice Scalia's concurring opinion in *Cruzan*. Justice Scalia rhetorically asks what safeguard exists to prevent the State from passing oppressive laws such as imposing a tax of 100% on income above the subsistence level or requiring us to send our children to

II

I would find that the challenged INS regulations unconstitutionally deprive detained alien minors of their liberty. The regulation's effect is to mandate continuous pre-hearing detention of alien minors if there is no relative or legal guardian readily at hand to whom they can be released. We should be guided therefore by cases that have analyzed laws mandating pretrial detention in other situations: *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) and *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).[5] Al-

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school for 10 hours a day. It is not, concludes Justice Scalia, the Due Process Clause. Instead, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan*, 110 S.Ct. at 2863. But who are the "loved ones" that the children imprisoned in INS detention camps can call upon to speak for them? Certainly not the politically powerful. Probably not even the enfranchised. The hardships the INS imposes in this case – even if they can be said to have the sanction of the democratic majority – fall on neither the majority nor their loved ones. Rather, they fall on a silent and isolated and helpless minority. Even if we were restricted to Justice Scalia's narrow version of individual liberty, the children would prevail.

[5] It is true that all procedural criminal protections do not apply in deportation hearings. This is because a deportation hearing is a purely civil matter designed to determine a person's eligibility to remain in this country and is "intended to provide a streamlined determination of eligibility to remain in this country, nothing more." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984).

Once again, however, this appeal is not about deportation hearings. It is about placing people in physical custody while they await disposition of their status. Thus it more closely resembles criminal incarceration. Administrative warrants are issued for the aliens' arrest, searches are permitted incidental to the arrests, their physical liberty is taken away, and they may challenge the length of their custody by petition-

though in both *Salerno* and *Schall* the Court upheld the challenged pretrial detention rules, both cases are instructive in the framework of analysis and a useful standard of comparison they provide. The striking differences between the facts of *Schall* and *Salerno* and the facts here reveal that the INS's regulations do not lie on the permissible side of the boundary.

Schall involved a substantive and procedural due process challenge to a statute authorizing pretrial detention of minors found to pose a serious risk to the community. As the Court noted, although juvenile offenses are not crimes and proceedings against juvenile offenders are characterized as civil, some of the protections provided in the criminal context apply in such civil proceedings because restrictions are placed on juveniles adjudged delinquent. 467 U.S. at 257, n. 4, 104 S.Ct. at 2406, n. 4. The Court stated that a minor's interest in "freedom from institutional restraints" is "undoubtedly substantial," although qualified by the fact that children "are always in some form of custody." *Id.* at 265, 104 S.Ct. at 2410. Even though the minor's liberty interest is qualified, the Court will require a "legitimate and compelling state interest" to override it. *Id.* at 264, 104 S.Ct. at 2409. There are four governmental concerns that the Court has recognized as sufficient to override this liberty interest and to justify pretrial detention: (1) danger to the community if the indi-

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ing for writ of habeas corpus. As the Tenth Circuit has concluded, detention of aliens pending deportation is properly analogized to incarceration pending criminal trial. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir.1981).

Significantly, in analyzing a federal pretrial detention statute in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, the Court relied on *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, which involved detention prior to *civil* proceedings. (The *Salerno* Court concluded that pretrial detention under the Bail Reform Act is regulatory, not penal.)

vidual were to be released; (2) risk of flight; (3) concern that the detainee might attempt to influence the tribunal illegitimately, for example, by intimidating witnesses or jurors; and (4) the need to protect a juvenile from the consequences of his criminal activity as well as to preserve and promote the welfare of the child. *Salerno*, 481 U.S. at 748-49, 107 S.Ct. at 2102; *Schall* 467 U.S. at 265-66, 104 S.Ct. at 2410-11. The government bears the burden of proving on an individualized basis that detention is required to serve these interests. The INS has not met its burden.

The stark contrast the INS regulations pose to the New York scheme upheld in *Schall* and the federal statute upheld in *Salerno* makes clear that the INS is acting well outside the realm found permissible by the Court. In *Schall* the New York statute authorized pretrial detention of accused juvenile delinquents based on a finding of a serious risk that the child would commit additional criminal acts before the return date. In upholding the law, the Court relied on the range of protections provided the juveniles. The child was guaranteed an individualized probable cause hearing to determine whether the child posed a risk to the community. There was a strictly limited period of prehearing detention and an expedited factfinding hearing. During their short stay (a *maximum* permissible detention of seventeen days for the most dangerous children and six days for less serious offenders) the children were subject to carefully regulated conditions of confinement providing for dormitory assignment based on age, size, and behavior, and they received counseling sessions, education and recreational programs. The protections upon which the Court relied to uphold pretrial detention in *Schall* are absent in *Flores*. The INS makes no attempt to expedite factfinding hearings, no time limits are imposed on the permissible period of detention. In fact, the INS admits it has no idea how long the children could be detained.

Other differences between *Schall* and the circumstances of this case further cut against the majority's position. First, the minors in question in *Schall* had been found to pose a danger to the community. If anything, the government has a *greater* interest in detaining juveniles accused of criminal activity than children it seeks only to deport; minors who are not even arguably a threat to the community should be subject to *fewer* restrictions on their physical liberty. Second, one of the explicit statutory purposes of the New York law was "to determine and pursue the needs and best interests of the child." *Id.* at 257, n. 4, 104 S.Ct. at 2406, n. 4. This justifies deference to the *parens patriae* role asserted by the government in a way that is markedly absent in the present case, where the explicit statutory purpose guiding the INS is to protect the national security and guide foreign relations.

The statute upheld in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, likewise is in sharp contrast to the regulations challenged here. The Court found the Bail Reform Act of 1984 constitutional because it was narrowly tailored to serve a compelling state interest. The Act requires courts prior to trial to detain arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that there is no other way to assure the appearance of the person at future proceedings or to protect the safety of the community. The *Salerno* Court emphasized the number of procedural safeguards provided the arrestee, including a "full-blown adversary hearing" in which the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, and the overwhelming nature of the government's interest in protecting the community from danger posed by those who have been arrested for violent and other partic-

ularly serious offenses. *Id.* at 750, 107 S.Ct. at 2103. Again, *Flores* stands in sharp contrast. The children do not pose a threat to the community. There are no comparable procedural protections.

Whatever the proper standard of review, the constitutionality of the INS's regulations must be assessed by evaluating the degree and nature of the harm imposed on the children against the nature of the government interest furthered by the regulations. To the extent the INS seeks to justify the regulation on the ground that they ensure the child's appearance at future hearings, that interest fails to justify the detention of the children. It is not even rational to suppose that the child will be more likely to return for his deportation hearing after being released to an irresponsible relative than if he is released to a responsible adult.[6]

The INS seeks to justify detaining the children primarily on the ground that they do so out of concern for the children's welfare. The INS's assertion that children's welfare is better served by remaining indefinitely in jail stretches credulity. Common sense as well as expert testimony tells us that keeping children in jail, even under "ideal" jail conditions simply is not a rational way for the government to fulfill its responsibilities as "surrogate parent."[7]

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[6] According to appellees, this was an after-the-fact justification put forward by the agency.

[7] Not surprisingly, experts advise that releasing children to any responsible adult is far preferable to jailing them, even under ideal conditions. *See* Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition (1980) (Restraint on the freedom of accused juvenile generally is contrary to public policy. Exceptions recommended only in the case of a juvenile accused of violent crime or

The inadequacy of the INS's justification is underscored by the fact that at the time the agency implemented these regulations out of its concern for the welfare of the children, it was incarcerating them in detention centers commingled with adults without providing them recreation, education, visitation by family or friends, and subjecting them to arbitrary strip searchers. It was only as a result of this lawsuit that the agency modified its treatment of the detainees. So although the conditions have been ameliorated by the settlement decree and a court order, the genuineness of the INS concern is placed in some doubt. Certainly at the outset of this litigation, the INS's professed concern for the children's welfare was entirely undercut by the reality of the conditions under which it detained them. Appellees' claim of pretext is not without substance particularly in light of the evidence that undocumented parents who came to claim their children were swooped up immediately and deportation proceedings commenced against them. If the INS were using the children as bait to lure their parents, this would not only be insidious, it would be unconstitutional. "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Plyler v. Doe*, 457 U.S. at 220, 102 S.Ct. at 2396.[8]

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with a demonstrated record of flight or who pose a threat to community or himself. "Whenever an accused juvenile cannot be unconditionally released, conditional or supervised release that results in the least restrictive interference with the liberty of the juvenile should be favored over more intrusive alternatives.") *Id.* at §§ 3.4 and 6.6.

[8] In its amendment at 1003, n. 2, the majority questions my skepticism over the INS's assertion that its policy of detaining children is justified by its pursuit of the children's best interests. The majority

Even assuming that protecting children is a compelling government interest and that Congress has delegated the duty to the INS in this instance, the INS had many options that would be more narrowly tailored and less burdensome. The INS argues that it "is not a social welfare agency" and insists that it does not have the resources or the expertise to assess whether an adult other than a parent or legal guardian would be responsible enough to take custody of a detained minor. However, evaluating the fitness of other adults to take custody of detained minors would appear to be much less burdensome than incarcerating children at a cost of up to $100 per day and overseeing their welfare in an institutional setting. The administrative burden to the INS in evaluating the fitness of a given adult to take custody of a detained minor would be an insufficient reason to infringe upon children's fundamental constitutional rights. *See Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150-52, 100 S.Ct. 1540, 1545-46, 64 L.Ed.2d 107 (1980) (administrative con-

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insists that it is rational to believe that indefinite detention of these children serves their welfare more than would releasing them to unrelated adults. The majority opinion raises the spectre of the INS releasing children to child abusers and sexual deviants. However, the INS presented no evidence that this was a risk. Indeed, in a brief filed after this appeal was submitted, amici, including the American Friends Service Committee, Lutheran Immigration and Refugee Service, the American Branch of the International Social Service and other organizations with expertise and experience assisting children and aliens, explained that in their experience it is church members, social workers, and parents with roots in the local community who are willing to take responsibility for the children. I agree that the INS must take precautions to determine that children are released to responsible and suitable adults. The majority accepts the INS's position that although it can afford to keep the children in custody, it does not have the resources to do the screening necessary to ensure their safety on release. I find this position incredible.

venience and savings from imposing blanket eligibility rule rather than making individualized determination of dependency insufficient to justify discriminatory state law.) The INS admits that it never has been sued for having released a juvenile to someone other than a parent or legal guardian, nor is it aware of any case in which a minor released to an unrelated adult has been harmed or neglected. There is simply no evidence that the INS's regulations in fact protect children, are necessary to avoid liability or tend to insure their appearance at future proceedings.

III

In response to appellees' argument that the INS should provide prompt, mandatory, neutral and detached review to every arrested minor, Judge Kelleher issued an injunction ordering the INS to provide all minors taken into custody an administrative hearing to determine probable cause for their arrest and the need to place any restrictions upon their release. The majority concludes that such procedural protections are not constitutionally required in civil deportation hearings. I disagree with this characterization of the issue. What is being challenged is the adequacy of procedures allowing pre-hearing detention following an administrative arrest. Determinations of who may remain in this country invoke entirely different concerns than does the treatment of those persons who are detained awaiting disposition of their immigration status. These INS procedures are more closely analogous to criminal proceedings.

As the Supreme Court repeatedly has instructed, the constitutional sufficiency of procedures must be determined with reference to the rights and interests at stake, and, of course, varies with the circumstances. *Morrissey v.*

Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Supreme Court held that judicial determination of probable cause is a constitutionally required prerequisite to extended restraint of liberty following arrest. Recognizing the injury to an individual's family relationships and job as well as the other restraints on liberty, the Court reasoned that when "the stakes are this high," a determination by a neutral magistrate is required. Prosecutorial judgment standing alone is not enough. *Id.* at 114, 95 S.Ct. at 863. Children held under administrative arrest in detention prior to their deportation hearings require no less. Nonetheless, the majority concludes that *Gerstein* is inapplicable because the arrests at issue in *Gerstein* were pursuant to criminal law while deportation hearings are civil proceedings. The majority instead would remand the case to the district court for application of the *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) test. Although I believe that the outcome under the *Mathews* test will be no different than the conclusion compelled by *Gerstein*, remanding the question to the district court is neither necessary nor appropriate.

In evaluating the constitutionality of procedures provided by the government in any case, *Mathews v. Eldridge* directs courts to consider the interest at stake for the individual, the governmental interests involved, and the value of additional procedural requirements. In essence, these are the factors the Court considered in deciding *Gerstein* the previous year. The Court concluded that an individual's interest in remaining free from incarceration is so great as to require the procedural protection of a neutral and detached magistrate. See also, *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (the liberty interest of a prisoner in not being classified as

mentally ill and transferred to a mental hospital is substantial enough to warrant the procedural safeguard of an independent decisionmaker). Indeed, in *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1983), the Court upheld New York laws governing the pretrial detention of juveniles explicitly in part because the procedural safeguards surpassed those required by *Gerstein*. The *Schall* Court's reliance on *Gerstein* is particularly significant in light of the fact that New York's juvenile detention proceedings are civil; the Court relied on both *Mathews* and *Gerstein* in evaluating the adequacy of procedures applied to determine juvenile detention.[9]

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[9] The majority disregards the Court's application of *Gerstein* to prehearing civil detention because, according to the majority, although the Court cited *Gerstein* numerous times, it "never declared, however, that *Gerstein's* standards directly applied to civil juvenile proceedings." This treatment of the Court's opinion is puzzling. The Court began its discussion of the sufficiency of the procedures afforded juveniles by stating that "In *Gerstein v. Pugh*, 420 U.S., at 114, [95 S.Ct., at 863], we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime. . . . *Gerstein* arose under the Fourth Amendment, but the same concern with 'flexibility' and 'informality,' while yet ensuring adequate predetention procedures, is present in this context (citations omitted). In many respect, the FCA provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*." *Id.* 467 U.S. at 274-75, 104 S.Ct. at 2415. The Court went to on [*sic*] explicitly compare aspects of the New York law with those features found constitutionally adequate in *Gerstein*.

The majority instead prefers to rely on the "forceful dicta" of *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960). In this 1959 spy case, the Supreme Court rejected a challenge to an arrest that was the product of the INS and the FBI working in concert. It is true that the Court deferred to the "overwhelming historical legislative recognition of the propriety of administrative arrest for deportable

CONCLUSION

We must remember that persons arrested by the INS are often entitled to and do remain in the United States. Some of the children arrested eventually will be found to be citizens or legal aliens, while others may be granted political asylum. Even if we were so unfeeling as to be unconcerned with the tragic effects on children who in the end will be returned to their home countries, at the least we ought to be alarmed at the effect on those who will remain. As the Supreme Court warned in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 " 'the illegal alien of today may well be the legal alien of tomorrow.' " Certainly, incarceration no less than denial of an education, will mean that these children " 'already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.' " *Id.* at 208-09, 102 S.Ct. at 2390.

I would affirm the district court.

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aliens." However, appellees do not challenge whether the INS may make administrative arrests; the issue is what protections must accompany those arrests.

The majority also relies on *Min-Shey Hung v. United States*, 617 F.2d 201 (10th Cir.1980), in which the tenth circuit held the INS procedures for arresting aliens to be sufficient to meet constitutional standards. The *Hung* court, however, did not explain how the INS's law enforcement officers decisions are "basically the same as a criminal proceeding before a magistrate on probable cause." 617 F.2d at 202. In any event, *Hung* did not present an issue of the adequacy of pre-hearing detention; the petitioner was released on bond within 24 hours.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-4544-RJK (Px)

JENNY LISETTE FLORES; ET AL., PLAINTIFFS

v.

EDWIN MEESE, III; ET AL., DEFENDANTS

[Entered May 25, 1988]

JUDGMENT

This matter was heard on each party's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court has considered the declarations, depositions, and other evidence submitted in support of and in opposition to said motions, as well as the

arguments of counsel. The Court has concluded that as to plaintiffs' first and second claims for relief, there is no genuine issue of material fact to be tried and that plaintiffs are entitled to judgment as a matter of law. Accordingly,

IT IS ORDERED that on due process grounds the plaintiffs' motion for summary judgment is granted and that defendants' motion for summary judgment is denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendants Attorney General, Immigration and Naturalization Service ("INS"), Harold W. Ezell, and their employees, officers, and agents (collectively referred to as "defendants") shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.

2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.

3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

The Clerk shall send, by United States mail, a copy of this Judgment to counsel for the parties.

DATED: May 24, 1988.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
Senior Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 85-4544-RJK (Px)

JENNY LISETTE FLORES; ET AL., PLAINTIFFS

vs.

EDWIN MEESE, III; ET AL., DEFENDANTS

[Filed Nov. 30, 1987]

MEMORANDUM OF UNDERSTANDING
RE COMPROMISE OF CLASS ACTION:
CONDITIONS OF DETENTION

1. The parties hereto shall stipulate to an order dismissing without prejudice plaintiffs' Third, Fourth, Fifth, and Sixth Causes of Action, said stipulation, and any order of dismissal entered pursuant thereto, to be conditioned upon implementation of and continuing compliance with the terms of this memorandum of understanding. This memorandum of understanding shall thereupon be an enforceable settlement agreement between the federal defendants and the plaintiff class.

2. Beginning on or before June 1, 1988, except in unusual and extraordinary circumstances as defined herein, the federal defendants shall house all juveniles detained

more than 72 hours following arrest in a facility that meets or exceeds the standards set out in the April 29, 1987, Notice of Funding Programs, 52 Fed.Reg. 15569-15573, attached hereto and incorporated by this reference, and in the document, "Alien Minors Shelter Care Program – Description and Requirements (April 28, 1987)," attached hereto and incorporated by this reference. Such facilities shall additionally provide minors educational and other reading materials in Spanish. The federal defendants shall make reasonable efforts to provide minors reading materials and educational instruction in other languages as needed. The parties agree to negotiate concerning postponement of the June 1, 1988, implementation date in the event of unforeseen circumstances.

3. The INS Regional Associate Commissioner for Operations shall be informed of and monitor instances in which juveniles are not transferred within 72 hours of arrest to a facility meeting the standards described in paragraph 2 above. Such monitoring shall ensure that juveniles are within 72 hours of arrest housed in facilities meeting said standards except in unusual and extraordinary circumstances.

4. "Unusual and extraordinary circumstances" justifying exception to the 72-hour transfer requirement shall be limited to those cases in which the interests of the affected minor would be served by housing the minor in a noncomplying facility or in which, because of unforeseen events, the affected minor cannot be housed in a complying facility.

5. For a period of twelve (12) months following dismissal as herein provided, the federal defendants shall report to the court *in camera* all exceptions to the 72-hour transfer requirement, including the name of the affected class member, the date of his or her arrest, the facilities in

which the minor has been housed and dates of occupancy, and the unusual and extraordinary circumstances warranting non-transfer.

6. Plaintiffs shall not refile or otherwise renew the claims alleged in their Third, Fourth, Fifth, and/or Sixth Causes of Action so long as defendants are in compliance with the terms of this memorandum of understanding. Plaintiffs agree to meet with the federal defendants to discuss any alleged non-compliance with the terms of the memorandum prior to refiling or otherwise renewing the claims alleged in their Third, Fourth, Fifth, and/or Sixth Causes of Action.

Approved as to form and content.

Dated: November 24, 1987.

NATIONAL CENTER FOR
IMMIGRANTS' RIGHTS, INC.
Carlos Holguin
Peter A. Schey

NATIONAL CENTER FOR YOUTH
LAW
Alice Bussiere
Teresa Demchak
James Morales

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
John Hagan
Paul Hoffman

/s/ [sig illegible]

Attorneys for Plaintiffs

Dated: November 29, 1987.

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
GEORGE WU
Assistant United States Attorney

/s/ Ian Fan

IAN FAN
Assistant United States Attorney
Attorneys for Federal Defendants

DEPARTMENT OF JUSTICE

Availability of Funding for Cooperative Agreements; Shelter Care and Other Related Services to Alien Minors

AGENCY: Community Relations Service (CRS), Justice.

ACTION: Notice of availability of funding for Cooperative Agreements to support programs which provide shelter care and other related child welfare services to alien minors detained in the custody of the United States Department of Justice, Immigration and Naturalization Service.

SUMMARY: This announcement governs the award of Cooperative Agreements to public or private non-profit organizations or agencies and under certain conditions, to for-profit organizations or agencies, to provide shelter care and other related child welfare services to alien minors detained in the custody of the United States Department of Justice, Immigration and Naturalization Service.

Awards will be to one (1) or more organizations. These awards are for the purpose of supporting licensed child welfare programs which provide shelter care and other related child welfare services to male and female alien minors under 18 years of age who are referred to the Community Relations Service by the Immigration and Naturalization Service.

These child welfare services will afford alien minors a structured, safe and productive environment which meets or exceeds respective state guidelines and standards for similar services designed to serve children in their care and custody. Applications submitted pursuant to this announcement must plan for the delivery of services to a

minimum population of 12-15 minors. The ability to provide services to a larger population of children is highly desirable.

The administration of Cooperative Agreements awarded under this announcement will require the substantial involvement of the Federal Government. The level and scope of Federal involvement is delineated in the Community Relations Service document entitled *Alien Minors Shelter Care Program—Description and Requirements.* This document is included in the Proposal Application Package available from the Community Relations Service.

DATE: Closing Date: 5:00 p.m., Eastern Daylight Time, Friday, June 12, 1987.

Proposals will be reviewed, evaluated and competitively rated by an independent panel of experts in the areas of child welfare and social services on the basis of weighted criteria listed in this Notice. All funding decisions are at the discretion of the Director, Community Relations Service. Awards will be subject to the availability of funds and the concurrence of the Assistant Commissioner, Detention and Deportation, Immigration and Naturalization Service.

Authorization

Authorities for the provision of certain child welfare services to alien minors detained in the custody of the Immigration and Naturalization Service (INS) are contained in a Memorandum of Agreement and an Inter-Agency Cost Reimbursable Agreement dated Octoer 1, 1986, and signed by the Acting Director, Community Relations Service; the Assistant Commissioner, Detention and Deportation, Immigration and Naturalization Service and the Director, Refugee Health Affairs, United States Public Health Service.

Legislative authority for the Community Relations Service, Cuban/Haitian Entrant Program is contained in Title V, section 501(c) of Pub. L. 96-422 (The Refugee Education Assistance Act of 1980).

Available Funds

Approximately $1,500,000 will be available for this program activity on a fiscal year basis. This estimate does not bind the Community Relations Service or the Immigration and Naturalization Service to any specific level of funding. This figure is only intended to serve as an estimate of the total amount of funding which could potentially be available during any specific fiscal year.

Future fiscal year funding for this program is contingent upon need and the availability of Federal appropriations. If adequate funds are available, the Acting Director, Community Relations Service, anticipates continuation of this program.

Awards normally will not exceed a 36 month program performance period. Funding will be for 12-month budget periods.

Eligible Applicants

Non-profit organizations incorporated under state law which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet applicable state licensing requirements for the provision of shelter care, foster care, group care and other related services to dependent children are eligible to apply.

For-profit organizations, incorporated under state law, which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet applicable state licensing requirements

for the provision of shelter care, foster care, group care and other related services to dependent children; and, which can clearly demonstrate that only actual costs, and not profits, fees, or other elements above cost have been budgeted, are also eligible to apply.

The geographical location of the applicant is not restricted to the geographic area of need identified in this Notice; however, the applicant must be able to strongly substantiate that its network of local affiliates or its subcontractor(s) or subrecipients(s) will be able to effectively and appropriately deliver the required services; and, that local service provides organizations are licensed to provide 24 hour care under applicable state laws.

Eligible Client Population

Under the terms of this announcement, the eligible client population will consist of male and female alien minors.

Definition of Alien Minor

For the purposes of this Notice, an alien minor is defined as a male or female foreign national, under 18 years of age, who is detained in the custody of the Immigration and Naturalization Service and is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act; or, has an application for asylum pending with the Immigration and Naturalization Service.

Designated Program Area

The designated program areas consist of:

- SOUTHERN CALIFORNIA (San Diego and Los Angeles Counties)
- TEXAS (Cameron County)

Technical Assistance Conference

The CRS will hold public meetings regarding this solicitation. Further information regarding time, date and location will be included in the Proposal Application Package.

SUPPLEMENTARY INFORMATION

Purpose and Scope

Community Relations Service Cooperative Agreement Recipients (hereafter referred to as Recipient) shall facilitate the provision of temporary shelter care and other child welfare related services to alien minors, who have been approved for transfer to a Community Relations Service supported Shelter Care Program.

These minors, although released to the physical custody of the Recipient, shall remain in the legal custody of the Immigration and Naturalization Service.

The population level of minors is expected to fluctuate as arrivals and case dispositions occur. Program content will, therefore, reflect differential planning of services to minors at various stages of adjustment and administrative processing. In addition, although the population of minors is projected to consist primarily of adolescents, Recipients are expected to be able to serve some children 12 years of age or younger.

Recipients are expected to facilitate the provision of assistance and services for each minor including, but not limited to: physical care and maintenance, access to routine and emergency medical care, comprehensive needs assessment, education, recreation, individual and group counseling, access to religious services and other social services.

Other services that are necessary and appropriate for these minors may be provided if the Community Relations

Service determines in advance that the service is reasonable and necessary for a particular child.

The Recipient will develop an appropriate individualized service plan for the care and maintenance of each minor in accordance with his/her needs as determined in an intake assessment. In addition, agencies or organizations are required to implement and administer a case management system which tracks and monitors client progress on a regular basis to ensure that each child receives the full range of program services in an integrated and comprehensive manner. Shelter care services shall be provided in accordance with applicable state child welfare statutes and generally accepted child welfare standards, practices, principles and procedures.

Service delivery is expected to be accomplished in a manner which is sensitive to culture, native language and the complex needs of these minors.

A. *Program Design*

The applicant must set forth in detail information concerning the following:

1. Organization/Agency Capability

A comprehensive overview of the applicant agency, agency qualifications and agency history, including agency philosophy, goals and history of experience with respect to the provision of child welfare or related services to children under 18 years of age.

Identification of the organization(s)/agency(ies) proposed for participation in the program, a description of their qualifications in relation to responsibilities; and the mechanism for coordination among these agencies (as applicable).

2. Target Population

A description of the proposed client population including a discussion of program acceptance criteria and estimates of the total number of minors to be served at any one time (capacity) and during any program year.

3. Management Plan

a. A plan which identifies the agency/organization which will have overall fiscal and program responsibility, as applicable.

b. Identifies the organizational structure and lines of authority.

c. Describes the overall proposed staffing plan and staff qualifications for the program.

d. Includes a comprehensive plan for coordination of activities between the various program components and coordination with other community and governmental agencies.

e. Staff supervisory model.

f. Provisions for staff training.

g. Proposed staff schedule(s).

h. Role of consultants and rationale for their use.

4. Individual Client Service Plans

Applicants are expected to describe in detail:

a. The methodology regarding the development of individual client service plans, and;

b. The process to ensure that service plans will be periodically reviewed and updated. Identify staff who will have responsibility for the development and updating of the plans.

5. Case Management

Describe in detail the case management system for tracking and monitoring client progress on a regular basis

to ensure that each minor receives the full range of program services in an integrated and comprehensive manner. Identify the staff positions responsible for coordinating the implementation and maintenance of the case management system.

6. Structure and Accountability

Applicants must fully describe:

a. The plan for developing and maintaining internal structure, control and accountability through programmatic means.

b. Utilization of daily logs, statistical reports, etc.

B. ***Client Services***

Applicants are required to describe in a detailed and comprehensive manner, the following services and the methodology for service delivery:

1. Physical Care and Maintenance;
2. Routine and Emergency Medical/Dental Care;
3. Orientation;
4. Individual Counseling;
5. Group Counseling;
6. Agriculturation/Adaptation;
7. Educational;
8. Recreation, Social and Work Activities;
9. Visitation Procedures;
10. Legal Services, and;
11. Family Reunification Services.

C. ***Client Records***

Applicants must provide descriptive information regarding the development, maintenance and content of individual client case records, including a description of all

material/information which will be maintained in these records.

D. *Program Records*

Applicants are required to set forth comprehensive information regarding the types of program records to be maintained by the program (daily activity logs, records of staff meetings, cash disbursement systems, daily and weekly status of population reports, etc.).

E. *Facility*

As applicable, applicants are required to set forth in detail the following:

1. A description of the physical structure and the allocation of space for residential and office use.
2. A description of the location of the facility and discussion of the basis for selection.
3. Proof, in the form of a written certification, that the program and facility meet all applicable zoning and child welfare licensing requirements.

F. *Program Evaluation*

Applicants must set forth a plan for program evaluation including identification of evaluative criteria.

G. *Community Support*

Applicants must identify those measures the agency will take or has taken, to assure and maintain community receptivity and support and/or reduce community opposition to the program.

H. **Budget**

Applicants are required to submit a comprehensive line item budget. A narrative explanation for each line item, included in each object class, must accompany the proposed budget.

I. *Supportive Addenda Material*

Applicants are required to submit the following supporting material as an addendum to the program proposal;

1. Administrative Requirements

A. Agency Administration and Organization

1. Agency organizational *chart* describing the agency as a whole and the organizational relationship of the proposed program to other agency programs.
2. Comprehensive organizational *chart* of the proposed program.
3. Copies of Articles or Incorporation.
4. Proof of IRS status as a non-profit organization, if applicable.
5. List of Officers and Board Members, if applicable.
6. List of professional affiliations and certifications.
7. Copy(ies) of applicable State child welfare licenses.

B. Organizational Standards/Policies and Policies Regarding Clients

1. Personnel Handbook and Standards of Conduct.
2. Statement regarding professional and agency liability.
3. Copy of Disciplinary Procedures.
4. Copy of Agency policy regarding the confidentiality of client information and records.
5. Discussion of the method to be used to inform clients of program rules, regulations and policies, including the confidentiality of client information.

6. Copy of Grievance Policy and Procedures.

7. Fire and earthquake evacuation procedures, as applicable.

C. Staff

1. Job/Position Descriptions and resumes (if individuals have been identified for certain positions) for all personnel to be hired for the program including documented evidence of the availability of bi-lingual and/or bi-cultural personnel.

2. Resumes and qualifications of program consultants.

D. Community Support of the Program

1. Letters of program support from local political representatives, social service agencies, etc. Letters should reflect writers' awareness of program's intent, potential Federal funding source and location of the program.

Letters should also contain a recommendation or comment regarding the proposed program.

2. A listing of service providers to whom clients will be referred, including name, address and description of service(s) to be provided.

3. A listing of voluntary and/or donated resources, including letters of intent from the agencies or entities providing the resources, if applicable.

E. Implementation Plan

A plan for program implementation including time-lines regarding significant milestones.

2. Finance

a. A copy of the most recent agency/organization audit.

b. A description of the agency/organization Financial Management System

c. A listing of other Federal, State, local or foundation grants, cooperative agreements or contracts, etc.

being administered by the applicant. This material should include information regarding the funding source(s); grant, cooperative agreements or contract number; level of financial support; purpose of award; grant, cooperative agreement or contract performance period; and name, address and telephone number of grant, cooperative agreement and/or contract officer (Federal, State or local).

d. Subrecipients and/or Subcontractors

1. Identify all proposed services which are to be awarded to subrecipients/subcontractors.

2. Provide relevant background material regarding the proposed subrecipient(s)/subcontractor(s).

3. Provide letters from the proposed subrecipient(s)/subcontractor(s) indicating their commitment and the specific services to be provided.

J. Screening Criteria

CRS will screen all applications submitted pursuant to this Notice. Screening shall be done to determine whether an application is sufficiently complete to warrant consideration and review by the CRS Grant Review Panel. An application may be rejected if:

1. The application is from an ineligible applicant.

2. The application is received after the closing date.

3. The application omits:

a. Documented written evidence of community support for the program.

b. A comprehensive line-item budget with appropriate descriptive narrative.

c. A copy of the latest financial audit of the applicant.

K. Criteria for Evaluating Applications

Applications will be competitively reviewed, evaluated and ranked according to the following weighted criteria:

1. The degree to which the entire proposed plan for developing, implementing and administering a shelter care program is clear, succinct, integrated, efficient, cost effective and likely to achieve program objectives.

2. The quality of the applicant's program management and staffing plans as demonstrated by:

- The adequacy of the plan for program management and the plan for coordination between the components of the program.
- The adequacy of the plan for coordination with community and governmental agencies.
- The adequacy of the qualifications of the applicant organization and the extent to which this organization has a demonstrated record as a provider of child welfare or other social services.
- The extent to which the applicant has a demonstrated capacity for effective fiscal management and accountability.
- The extent to which subrecipient(s)/subcontractor(s) have a demonstrated capacity for effective fiscal and program management and accountability.
- The adequacy of the plans for staff supervision and intra-program communication.
- The adequacy of the staffing plans in terms of the relationship between the proposed functions and responsibilities of the staff in the program, and the education and relevant experience required for the position.
- Clear organizational charts delineating organizational relationships and levels of authority, including the identification of the staff position accountable for the overall management, direction and progress of the program.

3. Program Services—The applicant's response to the required program services, including a description of program resources which demonstrates:

- The capacity of the program to offer comprehensive, integrated and differential services which meet the needs of the clients.
- Utilization of resources in a manner which enhances program control, structure and accountability.
- Provision of services in a manner which promotes and fosters cultural identification and mutual support.
- Sensitivity to the issues of culture, race, ethnicity and native language.

4. The degree to which the applicant provides effective strategies of programmatic control, predictability and accountability as evidenced by the structure and continuity inherent in the program design.

5. The adequacy of the plans for:

(a) Developing and updating individual client service plans, and;

(b) The proposed system of case management.

6. The reasonableness of the proposed budget and budget narrative, in relation to proposed program activities.

7. The degree to which the application has provided written documented evidence of community support and acceptance of the program.

L. Application Request and Submission

Eligible applicants may request a Proposal Application Package from the United States Department of Justice, Community Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815; Attention: Cynthia Bowie, Senior Grants Management Specialist.

Proposal Application Packages may also be obtained by contacting the Community Relations Service at (301) 492-5818 or 1-800-424-9304.

Applicants must submit a signed original and two (2) copies of the proposal and supporting documentation to the United States Department of Justice, Community Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815; Attention: Cynthia Bowie, Senior Grants Management Specialist.

Applications Delivered by Mail

An applicant must show proof of mailing consisting of the following:

1. A legible dated U.S. Postal Service postmark.

2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

3. A date shipping label, invoice or receipt from a commercial carrier.

If an application is sent through the U.S. Postal Service, the Director does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

Applicants should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, the applicant should check with their local Post Office.

Applicants are encouraged to use registered or at least First Class mail. Each late applicant will be notified that the application will not be considered.

Applications postmarked on or before June 12, 1987, shall be considered as timely applications.

Applications Delivered by Hand

An application that is hand-delivered must be taken to the United States Department of Justice, Community

Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

The Grants Management Office will accept hand-delivered applications between 9:00 a.m. and 5:00 p.m., Eastern Daylight Time daily, except Saturdays, Sundays and Federal holidays.

An application that is hand-delivered will not be accepted after 5:00 p.m., Eastern Daylight Time, on the closing date.

Catalog of Federal Domestic Assistance
Number: 16.201.

Dated April 24, 1987.

Wallace P. Warfield,

Acting Director, Community Relations Service.

Intergovernmental Review

Application Requirements

Pursuant to Executive Order 12372, *Intergovenmental Review of Federal Programs*, all States have the option of designing procedures for review and comment on Federally assisted programs. Each applicant is required to notify each State in which it is proposing activities under this announcement and to comply with the State's established review procedures. This may be done by contacting the applicable State Single Point of Contact (SPOC).

State Requirements

Comments and recommendations relative to applications submitted under this solicitation should be mailed no later than 45 days after the date of publication, addressed to: Richard Gutierrez, Coordinator, Immigration and Refugee Affairs, Community Relations Service, Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

ALIEN MINORS SHELTER CARE PROGRAM – DESCRIPTION AND REQUIREMENTS

United States Department of Justice

Community Relations Service

4/28/87

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I. *INTRODUCTION*:

The United States Department of Justice (DOJ), Community Relations Service (CRS) and Immigration and Naturalization Service (INS) have entered into an agreement to establish a network of community based shelter care programs to provide physical care and maintenance and other related services to alien minors detained in the custody of the Immigration and Naturalization Service.

The intent of this initiative is to provide a safe and appropriate environment for alien minors for the interim period beginning when the minor is transferred into a CRS Shelter Care Program and ending when a final disposition of the minor's status is implemented. Final disposition may result in either the bond, release or removal of the minor from the United States.

This document will provide operational policy instructions and application guidance to agencies and organizations which are applying for Federal funds to develop plans, programs, and administrative procedures for the care and maintenance of alien minors held in the custody of the INS.

II. *BACKGROUND*:

The Shelter Care Program described in this document was developed as an inter-agency approach and response to the complex issues associated with the apprehension and detention of alien minors by the Immigration and Naturalization Service.

The United States has traditionally accepted immigrants and refugees from around the world. Ordinarily, persons desiring such status apply for entry while residing in their own country or in a third country known as a "country of first asylum." However, since 1978, alien minors have

been entering the United States seeking refugee or immigrant status without any prior administrative processing. These minors are coming primarily from the Caribbean nations and from Central and South America.

During the past two years, significant numbers of minors have been entering the United States at various border points between the United States and Mexico. The largest concentrations of entries are in the States of Texas and California. These minors come primarily from El Salvador, Nicaragua, Guatemala and Honduras. When apprehended by Federal authorities, these minors are taken to either an INS Contract Facility or Border Patrol Facility. For the most part, these are adult detention facilities which are not appropriate environments for the detention of dependent minors.

Many of these detained minors (primarily males 13 to 17 years of age) are seeking some form of relief from deportation. It is estimated that as many as 5,500 other than Mexican minors were apprehended by Federal authorities during Federal Fiscal Year 1986. A majority of these children are found to be "bound for" parents, other relatives, godparents or friends already residing in the United States and it appears that the majority of these youths were attempting to establish residence in this country.

Since 1980, the CRS and INS have worked together to provide temporary shelter care and other related services to Cuban/Haitian Entrant and other alien minors apprehended and detained by the INS in South Florida. These minors are provided physical care and maintenance and other services while waiting disposition of various INS proceedings. This CRS program has provided services to over 2,500 children apprehended by the INS.

In October 1986, the CRS and INS entered into a comprehensive Inter-Departmental Memorandum of Agreement which provides the framework for a national initiative to address the challenges and complex issues created by this influx of Central American youth.

The CRS and INS intend to work closely with CRS Cooperative Agreement Recipients (hereafter referred to as Recipients) to assist with the development and administration of programs that address the intricate and complex needs of the youth for care and protection in a manner which meets the mandates of current United States law.

III. *SCOPE OF WORK:*

Recipients shall facilitate the provision of temporary shelter care and other related services to alien minors who have been approved for transfer from detention at various INS Contract Facilities or Border Patrol Facilities. Shelter care services will be provided for the interim period beginning when the minor is transferred into the Shelter Care Program and ending when a final disposition of the child's status is implemented. Final disposition may result in either the bond, release or removal of the minor from the United States.

These minors, although released to the physical custody of the CRS Recipient, shall remain in the legal custody of the INS.

The population level of alien minors is expected to fluctuate as arrivals and case dispositions occur. Program content must, therefore, reflect differential planning of services to children in various stages of personal adjustment and administrative processing. Although the population of minors is projected to consist primarily of adolescents, Recipients are expected to be able to serve some children 12 years of age and younger.

CRS Recipients are expected to facilitate the provision of assistance and services for each alien minor including, but not limited to: physical care and maintenance, access to routine and emergency medical care, comprehensive needs assessment, education, recreation, individual and group counseling, access to religious services and other social services.

Other services that are necessary and appropriate for these minors may be provided if CRS determines in advance that the service is reasonable and necessary for a particular child.

Recipients are expected to develop and implement an appropriate individualized service plan for the care and maintenance of each minor in accordance with his/her needs as determined in an intake assessment. In addition, Recipients are required to implement and administer a case management system which tracks and monitors client progress on a regular basis to ensure that each child receives the full range of program services in an integrated and comprehensive manner.

Shelter care services shall be provided in accordance with applicable State child welfare statutes and generally accepted child welfare standards, practices, principles, and procedures. The CRS intends that services be delivered in an open type of setting without a need for extraordinary security measures. However, Recipients are required to design programs and strategies to discourage runaways and prevent the unauthorized absence of minors in care.

Service delivery is expected to be accomplished in a manner which is sensitive to culture, native language and the complex needs of these children.

IV. ***AUTHORIZATION:***

Authority for the provision of shelter care and related child welfare services to alien minors detained in the custody of the Immigration and Naturalization Service (INS) is contained in a Memorandum of Agreement and an Inter-Agency Cost Reimbursable Agreement, dated October 1, 1986, and signed by the Acting Director, Community Relations Service; by the Assistant Commissioner for Detention and Deportation, Immigration and Naturalization Service and by the Director, Refugee Health Affairs, United States Public Health Service.

Legislative authority for CRS Cuban/Haitian Entrant child welfare activities is contained in Title V, Section 501(c) of Public Law 96-422 (The Refugee Education Assistance Act of 1980).

V. ***FUNDING INSTRUMENT AND AWARDS:***

Awards of Federal monies to support the activities detailed in this document will be in the form of Cooperative Agreements issued by the Community Relations Service. All final funding decisions are at the discretion of the Director, Community Relations Service.

In addition, Awards are subject to the availability of funds and the concurrence of the Assistant Commissioner for Detention and Deportation, Immigration and Naturalization Service.

Awards for shelter care activities normally will not exceed a 36 month program performance period. Funding will be for 12 month budget periods; continuation of funding is dependent upon successful completion of prior year objectives, the level of need as defined by the Federal Government and the availability of future fiscal year funding.

VI. ***APPLICABLE FEDERAL REGULATIONS AND REGULATORY REQUIREMENTS:***

Cooperative Agreements awarded by the Community Relations Service are subject to the following Federal Regulations:

Title 28, *Code of Federal Regulations*

Part 42, Subpart C	Non-discrimination in Federally assisted programs, Title VI of the Civil Rights Act of 1964
Part 42, Subpart D	Non-discrimination in Federally assisted programs—implementation of Section 815(c)(1) of the Justice System Improvement Act of 1979
Part 42, Subpart G	Non-discrimination based on handicap in Federally assisted programs
Part 42, Subpart H	Procedures for complaints of employment discrimination filed against recipients of Federal financial assistance

Title 41, *Code of Federal Regulations*

Title 45, Code of Federal Regulations

Part 46	Protection of Human Subjects

Title 48, *Code of Federal Regulations*

Part 31.2	Contract Cost Principles and Procedures

VII. ***ELIGIBLE APPLICANTS:***

Non-profit organizations incorporated under State law

which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet applicable state licensing requirements for the provision of shelter care, foster care, group care and related services to dependent children are eligible to apply.

For-profit organizations incorporated under State law which have demonstrated child welfare, social service or related experience and are appropriately licensed or can expeditiously meet state licensing requirements for the provision of shelter care, foster care, group care and other related services to dependent children and which can clearly demonstrate that only actual costs and not profits, fees, or other elements above cost have been budgeted, are also eligible to apply.

The geographical location of the applicant is not restricted to its selected area of service; however, the applicant must be able to strongly substantiate that its network of local affiliates or its subcontractor(s) or subrecipient(s) will be able to effectively and appropriately deliver the required services and that local service provider organizations are licensed under applicable State law to provide emergency shelter care and related services to dependent children.

VIII. *DEFINITION OF ALIEN MINOR:*

An alien minor is defined as a male or female foreign national under 18 years of age who is detained in the custody of the Immigration and Naturalization Service and is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act, or who has an application for asylum pending with the Immigration and Naturalization Service.

IX. *CLIENT POPULATION:*

It is anticipated that the client population will generally consist of males, 13-17 years of age. Females generally comprise approximately 15% of the total population of alien minors. These minors are primarily nationals of El Salvador, Nicaragua, Guatemala and Honduras; however, Recipients can expect to provide services to children from other countries. Recipients should also be prepared to provide emergency shelter care to limited numbers of children 12 years of age and younger.

Clients would generally be considered to be dependent children without significant behavioral or psychological problems. Many children have inconsistent or sporadic educational histories and some children may be illiterate in their own language.

X. *PROGRAM DESIGN:*

Shelter care and related services can be provided through either residential, foster or group care programs. Applicants are not restricted in their individual approaches to service delivery however, the ability to provide a mix of services and deliver these services in geographic proximity to the applicable District INS office is highly desirable due to the varying needs of the client population, the needs of the Federal Government and the varying length of time that the youth will be in care.

Recipients must be able to admit minors on a 24 hour per day, seven (7) day a week basis.

Control, predictability and accountability are essential elements of a successful program. A highly structured, active and productive day of activities mitigates against disruptive behavior.

Program design must insure that the youths follow an integrated and structured daily routine which shall include, but not be limited to: education, recreation, work or chores, study period, counseling, group interaction, free time and access to religious services.

This daily routine will enhance programmatic supervision and accountability as well as encourage the development of individual and social responsibility on the part of each child. Program rules and disciplinary procedures, written and translated into Spanish, must be provided to each client and fully understood by each client and all program staff.

Minors served by this Program are individuals who have entered the United States without inspection. These youths are seeking some type of relief from deportation through an administrative process.

Recipients and their staff are expressly prohibited from hindering or interferring with the execution of final case dispositions as determined by the Federal Government.

The length of care per child is anticipated to be approximately thirty (30) days; however, due to the variables and uncertainties inherent in each case, Recipients must design programs which are able to provide a combination of short term and long term care.

a) *Program Management:*

1. Organizational Structure and Coordination:

CRS Recipients are required to have operative plans which identify organizational structures, lines of authority and lines of responsibility. Recipients are also required to maintain and administer comprehensive plans which facili-

tate and enhance intra-program and intra-organizational (if appropriate) communication. At a minimum, programs must ensure weekly staff meetings to discuss client service plans, client progress and client work schedules.

Recipients must maintain linkages with other social service agencies, and the local District Office of the INS. The Program Director for each Recipient shall be responsible for maintaining working relationships and liaison with community orgranizations and the INS.

2. *Staffing:*

Programs must ensure:

- One (1) person identifiably responsible for the entire program and its outcomes;
- One (1) staff person identifiably responsible for the overall coordination of services including the case management system;
- Clear lines of authority and responsibility;
- Adequate professional staff available to provide program services;
- Adequate levels of staff available to provide structure and to coordinate and deliver all services required of the program;
- Availability of relief staff for illness and holidays;
- Availability of 24 hour per day, seven (7) days per week professional emergency backup staff;
- Employee educational and/or experience levels commensurate with the responsibilities and expertise required of the staff position;
- Staff training, and;

- Adequate levels of individual leave, sick and compensatory time.

All staff members who deal directly with clients must be culturally sensitive and bilingual in English and Spanish.

3. *Direct Program Services:*

All program planning should reflect innovative methods of service delivery. All services shall be delivered in accordance with applicable State licensing requirements and standards.

The following is a description of program services which all Recipients are required to provide:

a) *Care and Maintenance*:

Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, personal grooming items and personal allowance or remuneration for work (outside of normal chores or responsibilities) as defined by applicable State statutes.

b) *Routine and Emergency Medical/Dental Care*:

Access to appropriate routine medical and dental care, family planning services and emergency health care services are a required part of the program. Such services may be provided through enrollment in local medical assistance programs, coverage by health insurance plans or special arrangements with local providers.

Recipients are required to ensure that each child receives a complete medical examination (including screening for infectious disease) within 24 hours of admission, excluding weekends and holidays.

A written immunization policy and procedure which is in compliance with the U.S. Public Health Service, Center for Disease Control, should be implemented. Policy and procedure will be provided by INS.

If hospitalization is required, the Recipient is required to make the proper arrangements for admittance.

Recipients must develop and administer a comprehensive policy regarding the dispensing of medication and special diets.

Shelter care programs are required to have operative intervention plans in instances of mental health decompensation.

c) *Orientation:*

Upon admission, all clients must receive a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and legal assistance (INS Form I-770 shall be completed).

d) *Individual Counseling*:

Programs should schedule at least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing client progress, establishing new short term objectives and addressing both the developmental and crisis related needs of each minor. Reci-

pients should anticipate many "emergency" individual counseling sessions.

e) *Group Counseling*:

Programs must conduct group counseling sessions at least twice a week. This is usually an informal process and takes place with all the minors present. It is a time when new minors are given the opportunity to get acquainted with the staff, other children and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems.

f) *Acculturation/Adaptation*:

Recipients are required to provide a program which includes, but is not limited to, information regarding personal health and hygiene, human sexuality and the development of social and inter-personal skills which contribute to those abilities necessary to live independently and responsibly.

g) *Education*:

Recipients shall provide an education program in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education.

Services are to be provided by a teacher certified by the State Department of Education. The teacher shall assess each client in order to determine individual educational competency levels. This assessment may determine the need for bilingual classes. Students are usually separated into groups according to their educational competency level rather than by chronological age.

h) *Recreational and Leisure-Time*:

A recreation and leisure-time plan shall include at least one hour per day of large muscle activity and one hour of structured leisure-time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days school is not in session. The recreation program shall be organized and supervised by a trained staff member.

A variety of fixed and movable equipment will be provided for each recreation area. Examples of the variety of equipment that should be available include a basketball, volleyball, softball, tetherball, punching bag and soccer ball.

i) *Work/Employment*:

Written procedures regarding work assignment schedules shall be developed. Consideration will be given to the fact that juvenile aliens are not required to participate in uncompensated work assignments unless the work is housekeeping of personal areas or personal hygiene needs.

4. *Supplemental Services*:

a) *Visitation*:

Visitation and contact with family members shall be encouraged. Visitation at the facility or office shall occur on a day and time to be determined by the Recipient. Such visitation shall be supervised by staff and conducted in such a manner as to ensure reasonable procedures to prevent the unauthorized release of any minor in care.

All visitation plans and procedures require the prior approval of the designated CRS Program Officer.

b) *Legal Services*:

The INS provides all detained minors with specific information regarding the availability of free legal assistance and advises each minor of their right to be represented by an attorney, right to a deportation or exclusion hearing, right to apply for political asylum or right to request voluntary departure.

CRS Recipients are required to restate this information to each minor upon admission to the program. Recipients shall establish procedures to assist each minor in making confidential contact with attorneys or their authorized representatives.

Federal regulations prohibits the expenditure of any CRS Cooperative Agreement funds for the direct provision of legal services or assistance to any child in care.

c) *Family Reunification*:

Upon entering a CRS supported program, each minor shall be interviewed by an identified staff person with an educational background in the behavioral sciences, in an attempt to identify relatives for potential family reunification. Once relative information is obtained, staff is required to make telephone contact with the relative, verify the relationship and develop the following information:

1) *Identifying Data*—General information about all members of the household.
2) *Personality Description*—Description of relative's personality characteristics and their willingness to share information.
3) *Quality of Marriage*—Description of marriage, if applicable.
4) *Housing and Financial Situation*—Description of home, neighborhood, expenses, employment, income, etc.
5) *Plans for Minor*—Plans the relatives have for the minor (i.e., school enrollment).
6) *Personal References*—Two personal references from friends, relatives or other person(s) not living with the relative which can provide additional information, verify the information given by the relative and attest to the relative's commitment and ability to care for the child.
7) *Summary and Impressions*—Summary of overall impressions and recommendations.

The information and accompanying recommendation shall be given to the INS Office with responsibility for the minor's case. A copy of these materials shall be forwarded to the designated CRS Program Officer.

ALL FINAL DECISIONS REGARDING THE RELEASE OF MINORS TO RELATIVES WILL BE MADE BY OFFICIALS OF THE INS.

In some cases, it may be necessary for the family to obtain legal guardianship prior to release by the INS. In these cases, Recipients should assist relatives in filing the proper documentation under applicable State statutory requirements.

5. *Assessment*:

CRS Recipients are required to complete a comprehensive assessment of each child within ten (10) working days from the date of admission. The assessment includes:

1. An intake study which must:
   (a) Set forth the essential data relating to the identification and history of the child and family;
   (b) Summarize the specific events surrounding the minor's entry into the United States, and;
   (c) State the specific problem(s) which appear to require immediate intervention.
2. Educational assessment and plan.
3. Assessment of family relationships and interaction with adults, peers and authority figures.

4. A definition of religious preference and practice.
5. Assessment of personal goals, strengths and weaknesses.
6. Assessment of the impact of migration on the youth's future adjustment.
7. Identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States.

6. *Case Management*:

Recipients must ensure that comprehensive and realistic individual client service plans are developed, implemented and closely coordinated for each child through an operative case management system. Individual plans for the care of each minor must be developed in accordance with his/her needs as determined by the various assessments. Staff members responsible for specific case management activities must be identified and their responsibilities fully defined.

Due to the need for consistency and frequent updating of service plans, programs must also ensure that formalized lines of intra-program communication are established as an adjunct to informal channels of staff interaction.

7. *Client Case Records*:

Recipients are required to develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.

At a minimum, client case records must include the following information:

1) Name and alien control number;
2) Initial screening and intake forms;
3) Case information from the referral source;
4) Comprehensive assessment;
5) Medical/Dental files;
6) Medical consent form;
7) Individual service plans and case notes;
8) Progress reports;
9) Program rules/disciplinary policies;
10) Copies of disciplinary actions;
11) Referrals to other service agencies;
12) Cash transaction documentation;
13) Inventory of personal effects, and;
14) Any other relevant information.

8. *Program Evaluation*:

CRS Recipients must have operative program evaluation plans which include evaluative criteria.

9. *Community Support*:

Applicants are required to identify measures they will take or have taken to assure and maintain community receptivity and support and/or reduce community opposition to the program.

The CRS works closely with the INS in the development, implementation and administration of Shelter Care Programs, and relies upon the INS for various types of operational support. Recipients are also required to maintain ongoing operational relationships with applicable offices of the INS. The CRS will facilitate the development of such operational relationships.

In addition, it is essential that Program Directors develop and maintain liaison with other important community based public and private organizations and agencies.

XI. *SUPPLEMENTAL PROGRAM INFORMATION*

A) *Legal Guardianship*:

All alien minors transferred to CRS supported Shelter Care Programs shall remain in the legal custody of the INS.

B) *Categories of Minors in Federal Detention*:

Specific categories of Alien Minors detained in the custody of the INS are generally as follows:

1. Minors with no locatable parents in either the United States or the country of origin. Such children could be eligible for release or bonding to relatives, licensed child welfare agencies, or voluntary agencies willing to accept custody of these minors.

2. Minors whose parents are locatable in the country of origin and who are in a position to reassume custody of the child. Potentially, these children could be removed from the United States through either exclusion or deportation proceedings or could leave the United States through voluntary departure.

3. Minors with locatable parents residing in the United States. Two situations are in evidence:

   a) If the parent(s) is documented, the child would be released to the parent's custody;

b) If the parent(s) is undocumented, the child would be released to the parent's custody after the parents were processed by INS and subsequently assigned to a deportation docket.

INS policy is to release the child with the parents. However, it is possible that a parent could be detained if he/she were found to be the subject of an outstanding criminal warrant.

XII. *REPORTING REQUIREMENTS*:

A) *Program Reporting*:

1. *Quarterly Program Progress Report*:

Recipients shall, within thirty (30) days following the end of each calendar quarter, provide the Designated CRS Program Officer with a Quarterly Program Progress Report.

This report must include, but is not limited to, narrative information describing:

a) Program progress, movement toward attaining program goals, program achievements and program problems.

b) Programmatic or budgetary implementation time-lines for the next quarter.

c) Anticipated budgetary or programmatic modifications which will be requested during the next quarter.

d) A listing containing the names, positions and dates of action relating to all staff who were hired, laid off, fired, promoted, or who resigned during the reporting period.

e) Any child abuse or neglect incidents handled under State law.

f) Listing of all incidents which occurred during the quarter.

2. *Final Program Progress Report*:

A Final Program Progress Report is due ninety (90) days after the completion of the program performance period.

3. *Daily Reports*:

Recipients are required to maintain:

a) A chronological listing of all clients which includes name, alien control number, date of admission and date of discharge.

b) A Daily Entry Log which accounts for the whereabouts of each minor and documents any significant incidents which occurred during the period.

Copies of the above referenced information shall be included as an addenda to the Quarterly Program Progress Report.

4. *Status or Condition Report*:

CRS Recipients are required to immediately notify the applicable local District Office of the INS and the Designated CRS Program Officer of any change in the status or condition of any minor in care including the following:

a) Any unauthorized absence of the minor;
b) Pregnancy of the minor;
c) Child-birth by the minor;

d) Hospitalization of, or serious illness of, or injury to the minor;
e) Death of the minor;
f) Arrest and/or incarceration of the minor, and;
g) Any abuse or neglect incident handled under State law.

B) *Financial Reporting*:

In order to obtain financial information concerning the use of Federal funds, the CRS requires that Recipients of these funds submit timely reports for review. These reports are consistent with the manner of reporting established by OMB Circular A-110.

1. *Schedule of Cooperative Agreement Payment Requests*:

Recipients are required to provide the Grants Management Branch, CRS, with current time-lines reflecting the Recipient's anticipated draw-down of Federal funds.

This schedule of time-lines is due within thirty (30) days of the Recipient's acknowledging receipt of the award.

2. *Financial Reporting – (SF 269)*:

Recipients shall, within thirty (30) days following the end of each calendar quarter, furnish to the Grants Management Branch, CRS, an original and two (2) copies of the Financial Status Report, SF-269. This report is required of all CRS Recipients. It is designed to reflect financial information relating to Federal and non-Federal obligations and outlays.

Within ninety (90) days of the end date of the project performance and budget periods, Recipi-

ents must submit to the Grants Management Branch, CRS an original and two (2) copies of the Final Financial Status Report, SF-269.

3. *Financial Reporting – (SF-270)*:

This report is applicable to all Recipients who are funded on a "Check-Issued" basis. It is required to document the status of Federal cash when a recipient requests an advance or reimbursement of funds. This report is reviewed on a quarterly basis for Recipients receiving reimbursement of funds and on a monthly basis for those organizations receiving advance funding.

4. *Federal Cash Transaction Report – (SF-272)*:

Recipients shall, within fifteen (15) working days following the end of each quarter, furnish the Grants Management Branch, CRS with an original and two (2) copies of the Federal Cash Transaction Report, SF-272. It is designed to provided cash and disbursement information.

XIII. *RECORD RETENTION AND DISPOSITION OF DATA*:

CRS Recipients are required to maintain all records, program and financial information and/or data for three (3) years following the date of submission of a Final Program Progress Report.

At the conclusion of the three (3) year retention period, CRS will instruct Recipients regarding destruction or delivery of all records, program and financial information and/or other data.

Recipients are required to provide any and all records, program and financial information, and/or data requested by CRS. This information is to be delivered to:

UNITED STATES DEPARTMENT OF JUSTICE
COMMUNITY RELATIONS SERVICE
CUBAN-HAITIAN ENTRANT PROGRAM
SUITE 330
5550 FRIENDSHIP BOULEVARD
CHEVY CHASE, MD 20815

XIV. *PROGRAM APPLICATION ADDENDA MATERIAL*:

Shelter Care Program Applicants are required to attach the following addenda material to their technical program proposals. FAILURE TO COMPLY WITH THESE REQUIREMENTS COULD BE GROUNDS FOR NONACCEPTANCE OF PROPOSALS.

A) *Administrative Requirements*:

1. *Agency Administration and Organization*:

a) Agency organizational *chart* describing the agency as a whole and the organization relationship of the proposed program to other agency programs.

b) Comprehensive organizational *chart* of the proposed program.

c) Copies of Articles of Incorporation.

d) Proof of IRS status as a non-profit organization, if applicable.

e) List of Officers and Board Members, if applicable.

f) List of professional affiliations and certifications.

g) Copy(ies) of applicable State child welfare licenses.

2. *Organizational Standards/Policies and Policies Regarding Clients*:

a) Personnel Handbook and Standards of Conduct.

b) Statement regarding professional and agency liability.

c) Copy of Disciplinary Procedures.

d) Copy of agency policy regarding the confidentiality of client information and records.

e) Discussion of the method to be used to inform clients of program rules, regulations and policies, including the confidentiality of client information.

f) Copy of Grievance Policy and Procedures.

g) Fire and earthquake evacuation procedures, as applicable.

3. *Staff*:

a) Job/Position Descriptions and resumes (if individuals have been identified for certain positions) for all personnel to be hired for the program, including documented evidence of the availability of bi-lingual and/or bi-cultural personnel.

b) Resumes and qualifications of program consultants.

4. *Community Support of the Program*:

a) Letters of program support from local political representatives, social service agencies, etc. Letters should reflect writers'

awareness of program's intent, potential Federal funding source and location of program.

Letters should also contain a recommendation or comment regarding the proposed program.

b) A listing of service providers to whom clients will be referred, including name, address and description of service(s) to be provided.

c) A listing of voluntary and/or donated resources, including letters of intent from the agencies or entities providing the resources, if applicable.

5. *Implementation Plan*:

A plan for program implementation including time-lines regarding significant milestones.

B) *FINANCE*:

1. A copy of the most recent agency/organization audit.

2. A description of the agency/organization Financial Management System.

3. An itemization of all other Federal, State, local or foundation grants, cooperative agreements or contracts, etc., being administered by the applicant. This listing should identify the funding source; grant, cooperative agreement or contract number; level of financial support; purpose of award; grant, cooperative agreement or contract performance period; and name, address and telephone number of grant, cooperative agreement and/or contracts officer (Federal, State or local).

4. *Subrecipients and/or Subcontractors*:

a) Identify all proposed services which are to be procured through subrecipients/subcontractors.

b) Provide relevant background material regarding the proposed subrecipient(s)/subcontractor(s).

c) Provide letters from the proposed subrecipient(s)/subcontractor(s) indicating their commitment and the specific services to be provided.

C) *BUDGET*:

The proposed budget will be examined by the CRS Senior Grants Management Specialist to verify the costs data, evaluate specific elements of cost and determine if costs are necessary, reasonable and allowable under applicable Federal statutes and regulations. The following budget structure should be used to provide appropriate costs breakdowns.

Detailed costs justification (Budget Narrative) for each budget category ***MUST BE*** attached to the budget.

1. *Personnel*:

Show salaries and wages only. Fees and expenses for consultants should be included in another category entitled "other". The name and title, salary amounts and level of effort (allocation of time) must be identified for each position.

2. *Fringe Benefits*:

Submit a current copy of the negotiated fringe benefit rate. If fringe benefits are applicable to

direct salaries and wages and treated as a part of the negotiated Indirect Cost Rate (IDC), provide detailed information in the budget narrative.

3. *Travel*:

   Use only for travel (domestic) of employees on the Cooperative Agreement. Include estimated cost breakout for airfare, per diem ($100 per day plus an additional $25.00 per day for incidental expenses during the travel period—i.e., taxi, etc.), number of days, number of persons traveling for the purpose of attending a CRS sponsored conference.

   Travel costs for consultants should not be identified in this category, nor should costs associated with local transportation (i.e., where no out-of-town trip is involved).

4. *Equipment*:

   Use only for non-expendable personal property, which is defined as follows:

   Non-expendable personal property is tangible personal property having a useful life of more than two (2) years and an acquisition cost of $500 or more per unit. An applicant may use its own definition of non-expendable personal property provided that such definition would at least include all tangible personal property. Personal property is property of any kind except real property.

   Each item of non-expendable personal property must be identified and explained (i.e., office equipment and furnishings which are usable for activities other than the technical, specialized

aspects of the grant program). Indicate whether property will be purchased or leased.

5. *Supplies*:

   Include all tangible expendable personal property except that which is included in the equipment line. Requests in excess of $500 per category of tangible expendable personal property (supplies) must be identified and explained.

6. *Contractual*:

   Use for procurement contracts (except those which belong on other line items such as equipment, supplies, and construction). Payments to individuals such as stipends, consulting fees, and benefits must not be included in this category.

7. *Renovation*:

   Costs for alterations and renovation must be explained in detail.

8. *Client Costs*:

   All costs directly related to clients such as stipends and allowances, essentials, food, personal items, clothing, local transportation, out of pocket medical services, etc., must be identified and explained.

9. *Other*:

   a) All direct costs not clearly covered in categories listed above (i.e., consulting costs, local transportation, office and facility rental, van usage, fringe benefits included as a part of the IDC rate, etc.) must be identified and explained.

b) Requests for any item which requires prior approval by the CRS Grants Officer must be identified and explained.

c) Costs for space rental should be identified by square feet. Also identify utilities and break out costs per month.

10. *Indirect Costs*:

Identify and explain indirect cost items.

XV. *SUPPLEMENTAL INFORMATION–OFFICE AND RESIDENTIAL FACILITIES:*

The following information is intended to provide general guidelines and information regarding office spaces and residential facilities.

1. *Office Space*:

Depending on the program, appropriate office space may be:

a. Rented at the residential site (as a separate cost item);

b. Rented from the primary applicant of which the program is a part;

c. Provided free of cost, or;

d. Included in the rental of the residential facility.

In all cases except foster care services, it is essential that office space be co-located with a residential facility in order to facilitate oversight, control and staff coverage.

2. *Residential Facilities*:

Residential space requirements must be based upon the number of clients served and the types of services delivered on site.

a) CRS Recipients are required to set forth in detail the following:

1. A description of the physical structure and the allocation of space for residential and office use.

2. A description of the location of the facility and a discussion regarding the basis for selection.

3. A description of security measures which will discourage runaways and prevent the unauthorized release of a minor from the program.

b) In addition, applicants must include information supporting the following requirements:

1. All residential facilities and office space must conform to applicable zoning and special use permit requirements.

2. All facilities must conform to applicable building, fire, health and safety codes and/or ordinances.

3. All facilities must meet applicable state child welfare licensing requirements.

4. All programs must have established fire and, as applicable, earthquake,

evacuation procedures. All clients and staff must be familiar with these procedures.

5. All residential space (including foster homes) and office space must be equipped with smoke detectors and fire extinguishers.

Renovation of Facility:

In cases when renovation is required to bring a facility into compliance with existing codes and regulations, the extent and reasonableness of renovation costs depend upon the extent of repairs required, property value, etc. Repair work and renovation requires documented estimates of cost and time and a description of the repair. Programs must conform to the procurement standards set forth in Office of Management and Budget (OMB) Circular A-122.

All repairs and renovations require the prior approval of the CRS.

Maintenance of Facility:

Programs should include a monthly budgeted amount for maintenance and general repairs to the facility. This may include funds for commercial refuse disposal contracts. The lease or rental agreement should clearly define the extent of leaseee and leasor responsibilities as they pertain to maintenance and repairs.

Leases:

Programs must be flexible in lease arrangements in order to accommodate an uncertain client flow from Federal detention. Leases should include options for renewal beyond the anticipated end date of the lease agreement.

All leases are subject to the prior approval of CRS Program and Grants Management staff.

Insurance:

All program facilities must have adequate levels of fire, theft and liability insurance.

Utilities:

Programs should budget for this expense on a monthly basis if not included in the monthly rent. If office space is shared with another program or agency, utilities are to be pro-rated according to the percent of usage as it relates to square feet. Utilities include heat, water, electricity and natural gas.

XVI. *SUPPLEMENTAL INFORMATION—EQUIPMENT, FURNISHINGS AND SUPPLIES*:

The following information is intended to be illustrative of equipment, furnishings and supplies which are considered to be reasonable and necessary in the operation of a shelter care program.

CRS Recipients are required to obtain the following through the most cost-effective means available.

1. *Equipment*:

   The following is seen as reasonable for the furnishing of office space.

   Office Furnishings:
   a. Desks
   b. Chairs
   c. Tables
   d. File Cabinets
   e. Typewriters or Word Processing System
   f. Copy Machine

g. Book Cases/Shelves
h. Lamps
i. Tapes and Cassette Player
j. Telephones
k. Paging System

The determination should be made whether it is more cost effective to lease or buy a particular piece of equipment or obtain it through the General Services Administration. In addition, items that can be used free of charge by a program should be identified.

2. *Residential Furnishings*:

The program should provide the following furnishing for their residential operation.

a. Tables
b. Chairs
c. Desks (study space)
d. Books and Shelves
e. Bulletin Board
f. Television Set
g. Stereo or Radio
h. Couch
i. File Cabinet
j. Maintenance tools
k. Appliances/Kitchen Implements
l. Recreational Equipment

3. *Administrative and Facility Supplies*:

Included are:

a. General Office Supplies such as pens, pencils, paper etc.
b. Household and Maintenance Supplies
c. Copier Supplies

d. Educational Material and Supplies
e. Vehicle Maintenance Supplies
f. Postage Stamps
g. Forms

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. § 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

2. § 1357. Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

* * * * *

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

3. § 242.2 Apprehension, custody, and detention.

(a) *Detainers in general.* (1) Only an immigration officer as defined in section 101(a)(18) of the Act, or § 103.1(q) of this chapter is authorized to issue a detainer. Detainers may be issued only in the case of an alien who is amenable to exclusion or deportation proceedings under any provision of law.

(2) *Availability of records.* In order for the Service to accurately determine the propriety of issuing a detainer, serving an order to show cause, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Service of a conviction or act which renders an alien excludable or

deportable under any provision of law shall provide the Service with all documentary records and information available from the agency which reasonably relates to the alien's status in the United States, or which may have an impact on conditions of release.

(3) *Telephonic detainers.* Issuance of a detainer in accordance with this section may be authorized telephonically, *provided* such authorizations are confirmed in writing on Form I-247, or by electronic communications transfer media (e.g. the National Law Enforcement Telecommunications System (NLETS)) within twenty-four hours of the telephonic authorization. The contents of the electronic transfer shall contain substantially the same language as the Form I-247.

(4) *Temporary detention at Service request.* Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed forty-eight hours, in order to permit assumption of custody by the Service.

(5) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter shall incur any fiscal obligation on the part of the Service, until actual assumption of custody by the Service, except as provided in paragraph (a)(4) of this section.

(b) *Use of convictions.* The term *conviction* as used in section 242(i) of the Act means that –

(1) There has been a conviction by a court of competent jurisdiction; and

(2) All direct appeal rights have been exhausted or waived; or

(3) The appeal period has lapsed.

(c) *Warrant of arrest.* (1) At the time of issuance of the Order to Show Cause, or at any time thereafter and up to

the time the respondent becomes the subject of a duly issued warrant of deportation, the respondent may be arrested and taken into custody under the authority of a warrant of arrest, provided that, in the case of a respondent convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, the respondent shall not be released from custody unless a determination is made by the District Director that the respondent's departure cannot be effected, or until respondent becomes subject to supervision under the authority contained in section 242(d) of the Act. However, such warrant may be issued by no other than a:

(i) District director;
(ii) Acting district director;
(iii) Deputy district director;
(iv) Assistant district director for investigations;
(v) Deputy assistant district director for investigations;
(vi) Assistant district director for deportation;
(vii) Deputy assistant district director for deportation;
(viii) Assistant district director for examinations;
(ix) Deputy assistant district director for examinations;
(x) Assistant district director for anti-smuggling;
(xi) Officer in charge (except foreign);
(xii) Chief patrol agent;
(xiii) Deputy chief patrol agent;
(xiv) Associate chief patrol agent;
(xv) Assistant chief patrol agent; or
(xvi) The Assistant Commissioner, Investigations.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to

issue such warrant may authorize its cancellation. When a warrant of arrest is served under this part, the respondent shall have explained to him/her the contents of the order to show cause, the reason for the arrest and the right to be represented by counsel of his/her own choice at no expense to the Government. He/she shall also be advised of the availability of free legal services programs qualifed under part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the deportation hearing will be held. The respondent shall be furnished with a list of such programs, and a copy of Form I-618, Written Notice of Appeal Rights. Serrvice of these documents shall be noted on Form I-213. The respondent shall be advised that any statement made may be used against him/her. He/she shall also be informed whether custody is to be continued or, if release from custody has been authorized, of the amount and conditions of the bond or the conditions of release. Except in cases involving an alien convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, a respondent on whom a warrant of arrest has been served may apply to any officer authorized by this section to issue such a warrant for release or for amelioration of the conditions under which he/she may be released. When serving the warrant of arrest and when determining any application pertaining thereto, the authorized officer shall furnish the respondent with a notice of decision, which may be on Form I-286, indicating whether custody will be continued or terminated, specifying any conditions under which release is permitted, and advising the respondent appropriately whether he/she may apply to an immigration judge pursuant to paragraph (d) of this section for release or modification of the conditions of release or whether he/she may appeal to the Board. A direct appeal to the

Board from a determination by an officer authorized by this section to issue warrants shall not be allowed except as authorized by paragraph (d) of this section.

(d) *Authority of Immigration Judge; Appeals.* After an initial determination pursuant to paragraph (c) of this section, and at any time before a deportation order becomes administratively final, upon application by the respondent for release from custody or for amelioration of the conditions under which he or she may be released, an Immigration Judge may exercise the authority contained in section 242 of the Act to continue to detain a respondent in, or release from custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any. Application for the exercise of such authority must be made in the following order: First, if the alien is detained, the Immigration Judge Office at or nearest the place of detention; second, the Immigration Judge Office having administrative control over the case; third, the Office of the Chief Immigration Judge for designation of an appropriate Office of the Immigration Judge. However, if the respondent has been released from custody, such application must be made within seven (7) days after the date of such release. Thereafter, application by a released respondent for modification of the terms release may be made only to the District Director. In connection with such application the Immigration Judge shall advise the respondent of his right to representation by counsel of his or her choice at no expense to the government. He or she shall also be advised of the availability of free legal services programs qualified under part 292(a) of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where his or her application is to be heard. The Immigration Judge shall ascertain that the respondent has received a list of such programs, and the receipt by the respondent of a

copy of Form I-618, Written Notice of Appeal Rights. Upon rendering a decision on an application under this section, the Immigration Judge (or District Director if he renders the decision) shall advise the alien of his or her appeal rights under this section. The determination of the Immigration Judge in respect to custody status or bond redetermination shall be entered on the appropriate EOIR form at the time such decision is made, and the parties shall be promptly informed orally or in writing as the reasons for the Judge's decision. Consideration under this paragraph by the Immigration Judge of an application or request of a alien regarding custody or bond shall be separate and apart from any deportation hearing or proceeding under this part, and shall form no part of such hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information which is available to the Immigration Judge or which is presented to him by the alien or the Service. The alien and the Service may appeal to the Board of Immigration Appeals from any such determination. If the determination is appealed, a written memorandum shall be prepared by the Immigration Judge giving reasons for the decision. After a deportation order becomes administratively final, or if recourse to the Immigration Judge is no longer available because of the expiration of the seven-day period aforementioned, the respondent may appeal directly to the Board from a determination by the District Director, Acting District Director, Deputy District Director, Assistant District Director for Investigations, or Officer in Charge of an office enumerated in § 242.1(a), except that no appeal shall be allowed when the Service notifies the alien that it is ready to execute the order of deportation and takes him into custody for that purpose. An appeal to the Board shall be taken from a determination by an Immigration Judge pursuant to § 3.36 of this

chapter. An appeal to the Board taken from an appealable determination by the District Director, Acting District Director, Deputy District Director, Assistant District Director for Investigations, or Officer in Charge of an office enumerated in § 242.1(a), shall be perfected by filing a notice of appeal with the District Director within 10 days after the date when written notification of the determination is served upon the respondent and the Service. Upon the filing of a notice of appeal from a District Director's determination, the District Director shall immediately transmit to the Board all records and information pertaining to that determination. The filing of an appeal from a determination of an Immigration Judge or a District Director shall not operate to delay compliance, during the pendency of the appeal, with the custody directive from which appeal is taken, or to stay the administrative proceedings or deportation.

(e) *Revocation.* When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in § 242.1(a), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and cancelled. The provisions of paragraph (d) of this section shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(f) *Supervision.* Until an alien against whom a final order of deportation has been outstanding for more than six months is deported, he shall be subject to supervision by a district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in

§ 242.1(a), and required to comply with the provisions of section 242(d) of the Act relating to his availability for deportation.

(g) *Privilege of communication.* Every detained alien shall be notifed that he may communicate with the consular or diplomatic officers of the country of his nationality in the United States. Existing treaties require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in exclusion or expulsion proceedings, whether or not requested by the alien, and, in fact, even if the alien requests that no communication be undertaken in his behalf:

Algeria[3]
Argentina[3]
Australia[3]
Austria[3]
Belgium[3]
Bolivia[3]
Brazil[3]
Cameroon[3]
Canada[3]
Chile[3]
China, People's Rep. of[6]
China, Rep. of
Colombia[3]
Costa Rica
Cuba[3]
Czechoslovakia[3]
Cyprus
Denmark[3]
Dominican Republic[3]
Ecuador[3]
Egypt[3]

See footnotes at end of table.

El Salvador[3]
Fiji[3]
France[3]
Gabon[3]
Gambia
Germany, Fed Rep.[3]
Ghana
Guatemala[3]
Guyana[3]
Holy See[3]
Honduras[3]
Hungarian People's Rep.[5]
Iraq[3]
Ireland[1]
Italy[3]
Jamaica
Jordan[3]
Kenya
Kuwait
Laos[3]
Lesotho[3]
Liechtenstein[3]
Luxembourg[3]
Madagascar[3]
Malawi
Malaysia
Mali[3]
Malta
Mauritius[3]
Mexico[3]
Nepal[3]
New Zealand[3]
Niger[3]

See footnotes at end of table.

Nigeria
Oman[3]
Pakistan[3]
Panama[3]
Paraguay[3]
Philippines
Poland[2]
Portugal[3]
Romania[4]
Rwanda[3]
Senegal[3]
Sierra Leone
Singapore
Somalia[3]
Spain[3]
Sweden[3]
Switzerland[3]
Tanzania
Tonga[3]
Trindad & Tobago
Tunisia[3]
Uganda
United Kingdom
England
Northern Ireland
Scotland
Southern Rhodesia
Wales
Union of Soviet Socialist Rep. (USSR)
Uruguay[3]
Upper Volta[3]
Venezuela[3]

See footnotes at end of table.

Viet-Nam, Rep.[3]
Yugoslavia[3]
Zambia

4. § 242.24 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.

In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

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[1] Unless national requests that such information not be transmitted.

[2] If national is an alien admitted to lawful permanent residence, communication will be made with Polish consulate only upon the request of such national.

[3] If national requests his government be notified. INS must notify *immediately*.

[4] Notification must be made within two days.

[5] Notification must be made within three days.

[6] Notification must be made within four days.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

(c) *Juvenile Coordinator.* The case of a juvenile for whom detention is determined to be necessary should be referred to the *Juvenile Coordinator*, whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the INS, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) *Detention.* In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement

for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by INS authorities or placed in any INS detention facility having separate accommodations for juveniles.

(e) *Refusal of release.* If a parent of a juvenile detained by the INS can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his/her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and shall be afforded an opportunity to present their views to the district director, chief patrol agent or immigration judge before a custody determination is made.

(f) *Notice to parent of application for relief.* If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from deportation, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United states, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director or immigration judge before a determination is made as to the merits of the request for relief.

(g) *Voluntary departure.* Each juvenile apprehended in the immediate vicinity of the border who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. Each other juvenile apprehended shall be provided access to a telephone and must in fact communicate

with either a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If the juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact the requirements of this section are satisfied.

(h) *Notice and Request for Disposition.* When a juvenile alien is apprehended, he or she must be given a Notice and Request for Disposition. If the juvenile is under fourteen years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language the juvenile understands. In the event a juvenile who has requested a hearing pursuant to the Notice subsequently decides to accept voluntary departure, a new Notice and Request for Disposition shall be given to, and signed by the juvenile.

5. § 287.3 Disposition of cases of aliens arrested without warrant.

An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him/her, may examine the alien. If such examining officer is satisfied that there is prima facie evidence establishing that the arrested alien was entering or attempting to enter the United States in violation of the immigration laws, he/she shall refer the case to an immigration judge for further inquiry in accordance with parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or regulations applicable to the

particular case. If the examining officer is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws, further action in the case shall be taken as provided in part 242 of this chapter. After the examining officer has determined that formal proceedings under sections 236, 237, or 242 of the Act, will be instituted, an alien arrested without warrant of arrest shall be advised of the reason for his/her arrest and the right to be represented by counsel of his/her choice, at no expense to the government. The alien shall also be provided with a list of the available free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter which are located in the district where the deportation hearing will be held. It shall be noted on Form I-213 that such a list was provided to the alien. The alien shall also be advised that any statement made may be used against him/her in a subsequent proceeding and that a decision will be made wihin 24 hours as to whether he/she will be continued in custody or released on bond or recognizance. Unless voluntary departure has been granted pursuant to § 242.5 of this chapter, the alien's case shall be presented promptly, and in any event within 24 hours, for a determination as to whether there is prima facie evidence that the arrested alien is in the United States in violation of law and for issuance of an order to show case and warrant of arrest as prescribed in part 242 of this chapter.

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